

VERBATIM <sup>1</sup>RECORD OF TRIAL <sup>2</sup>

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

[REDACTED]

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

## Date or Dates of Trial:

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<sup>1</sup> Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

<sup>2</sup> See inside back cover for instructions as to preparation and arrangement.

1 MJ: All right. Is there anything else we need to address today  
2 in open court until we recess for the next Article 39(a) session?  
3 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.  
4 TC[MAJ FEIN]: No, Your Honor.  
5 MJ: All right. How long of a recess would you like before we  
6 move into the closed session. Mr. Coombs, I really would, if you can  
7 do that e-mail, that would be helpful for me to have in the closed  
8 session, so consider that when we're talking about the recess.  
9 CDC[MR. COOMBS]: Okay. Ma'am, actually on my phone, if I'm  
10 not restricted from having e-mail access, I can type it up real fast  
11 and send it to you.  
12 TC[MAJ FEIN]: Ten to fifteen minutes, Your Honor.  
13 MJ: Why don't we make it 20 just to be safe? Why don't we say  
14 5 after 11:00 we'll start? Does that work for both sides?  
15 TC[MAJ FEIN]: Yes, ma'am.  
16 CDC[MR. COOMBS]: Yes, ma'am.  
17 MJ: For members of the public, this is -- this concludes the  
18 open session of the Court for this Article 39(a) session. Once  
19 again, the next Article 39(a) session in this case is set to begin on  
20 10 April 2013. Our usual start time has been 0930. Do the parties  
21 wish to adhere to that start time?  
22 TC[MAJ FEIN]: Yes, ma'am.  
23 CDC[MR. COOMBS]: Yes, Your Honor.

1 MJ: All right. So it will be then at 0930 on 10 April 2013.

2 The Court is in recess.

3 [The Article 39(a) session recessed at 1050, 1 March 2013.]

4 [END OF PAGE]

Pages 6958 through 6982 of this transcript are classified “SECRET”. This session (1 March 2013, Session 1) is sealed for Reasons 2 and 3, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.



Pages 6983 through 7014 of this transcript are classified “SECRET”. This session (8 March 2013, Session 1) is sealed for Reasons 2 and 4, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

1 [The Article 39(a) session was called to order at 0953, 10 April  
2 2013.]

3 MJ: This Article 39(a) session is called to order.

4 Trial Counsel, please account for the parties.

5 TC[MAJ FEIN]: Yes, ma'am. Ma'am, all parties when the court  
6 last recessed are again present with the following exceptions:  
7 Captain Overgaard is present; Mr. Chavez, court reporter, is absent;  
8 Mr. Robertshaw, court reporter, who has been previously sworn, is  
9 present.

10 MJ: Thank you.

11 All right. Before we begin today's proceedings, I would  
12 like to address the spectators in the gallery and the media  
13 operations center. Rule for Court-Martial 806(c) and the Rules of  
14 Practice before Army Courts-Martial prohibit video and audio  
15 recordings of Court-Martial proceedings. I implemented these rules  
16 for this trial. In light of the public interest in this case, I have  
17 allowed contemporaneous closed circuit audio and visual transmission  
18 of the proceedings to the media center. There has been a violation  
19 of the Court's rules. After the last Article 39(a) session on 26  
20 February through 1 March 2013, an audio broadcast was placed on the  
21 Internet of PFC Manning's statement that he read during his  
22 providence inquiry. I remind you that phones and recording devices  
23 are not allowed in the media operations center. To date, I have not

1 ordered persons in the media operation center to be screened for  
2 phones and recording devices. I hope I don't have to. I trust you  
3 will all follow the Court's rules and we will not have any additional  
4 violations of the Rules of Court. Thank you.

5 Does either side desire to supplement anything I just said?

6 TC[MAJ FEIN]: No, Your Honor.

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: All right. We'll begin, as we normally do, with what I  
9 call housekeeping matters. In between Article 39(a) sessions, the  
10 parties file documents that are added into the record at the next  
11 session. One of the things that has been sent to the Court on April  
12 3rd, was an e-mail from the government stating that the government  
13 and the defense are working together to decide what, if anything, the  
14 parties are going to stipulate to, and they would advise me by the  
15 end of this Article 39(a) session, which will be the 12th, at least  
16 as scheduled, what stipulations the parties agree to. I'm fine with  
17 that. I orally approved that to the parties.

18 At an R.C.M. 802 session, that's a conference that I hold  
19 with parties to talk about logistics and other scheduling issues  
20 arising in the case. I'll discuss that in further depth later today.  
21 We held an R.C.M. 802 session on the 4th of April. Does either side  
22 desire anything further with that?

23 CDC[MR. COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: No, Your Honor.

2 MJ: Before I get into the R.C.M. 802 conference, Major Fein,  
3 would you like to set forth for the record what additional filings  
4 have been made by the government?

5 TC[MAJ FEIN]: Yes, ma'am. Ma'am, just the government or also  
6 the defense?

7 MJ: You can do the defense too.

8 TC[MAJ FEIN]: Yes, ma'am. Ma'am, on 8 March 2013, the defense  
9 filed a supplemental M.R.E. 505(h) notice, which has been marked as  
10 Appellate Exhibit 504; it's a classified filing.

11 On 15 March 2013, the government filed an updated *Grunden*  
12 filing via SIPRNET and then, on the same day, Your Honor, the  
13 government filed a corrected copy of that classified filing via  
14 SIPRNET. The correct copy has been marked as Appellate Exhibit 505.  
15 On the same day, the government filed an unclassified and redacted  
16 version; and, that has been marked as Appellate Exhibit 506.

17 On the 15th of March 2013, the government filed a targeted  
18 brief based on the interplay of Military Rule of Evidence 505 and  
19 Rule for Court-Martial 806 and *Grunden*. That has been marked as  
20 Appellate Exhibit 507.

21 On the 21st of March 2013, the defense filed its targeted  
22 brief on the interplay of M.R.E. 505 and R.C.M. 806 and *Grunden*. It

1 was titled Courtroom Closure; and, it's been marked as Appellate  
2 Exhibit 508.

3 On the 28th of March 2013, the defense filed its motion to  
4 have a witness for the Court to consider in making the Court's  
5 *Grunden* determinations. That's been marked as Appellate Exhibit 513.

6 On the 29th of March 2013, the government filed a targeted  
7 brief on the reason to believe element of 18 U.S.C. 793; and, that  
8 has been marked as Appellate Exhibit 509.

9 On the 29th of March 2013, the government filed a targeted  
10 brief on the receipt of intelligence element under Article 104 and  
11 that has been marked as Appellate Exhibit 510.

12 On the 29th of March, the government filed another target  
13 brief on courtroom closure. That has been marked as Appellate  
14 Exhibit 511. Also, on the 29th of March 2013, the defense filed a  
15 targeted brief on the reason to believe being an element or not of 18  
16 U.S.C. 793 violation. That's been marked as Appellate Exhibit 514.

17 Your Honor, on the 3rd of April 2013, the government filed  
18 a response to the defense request for a witness for a *Grunden*  
19 hearing. That has been marked as Appellate Exhibit 512.

20 That is it, Your Honor.

21 MJ: Mr. Coombs, does the defense have anything to add?

22 CDC[MR. COOMBS]: No, Your Honor.

1 MJ: In light of the defense motion for appropriate relief that  
2 has been marked as Appellate Exhibit 513, the Court and the parties  
3 held an R.C.M. 802 conference. Once again, that's a conference where  
4 I go over logistics and scheduling issues with counsel. We held that  
5 and then we put the -- excuse me, we put the information that was  
6 discussed on the record at the next session. In this case, we held  
7 the R.C.M. 802 conference because the defense requested basically  
8 what I called a dry run witness to actually come to court and testify  
9 in a closed session with the same testimony that that witness would  
10 be making in court to assist the court and the parties to determine  
11 whether there are alternatives to closure that exist for classified  
12 information and to actually have that witness testify so we know what  
13 information could potentially be at issue. In light of the logistics  
14 of that, should the Court order it, the Court decided not to wait  
15 until today to go over that with counsel.

16 We held the R.C.M. 802 conference on the 4th of April. I  
17 was there personally with some of the counsel. Other counsel called  
18 in telephonically. Normally, on these R.C.M. 802 conferences I put  
19 together an e-mail and send it out to the parties synopsizing what  
20 occurred. Since this took place away from the computer from me, I  
21 had asked one of the government counsel present to record what had  
22 occurred. That recording was captured in an e-mail that went to both

1 parties. The defense did not have any additions to that R.C.M. 802  
2 summary.

3 The R.C.M. 802 summary is as follows:

4 This e-mail synthesizes what was discussed during the R.C.M.  
5 802 conference held in the command building conference room at Fort  
6 McNair at 1500 on 4 April 2013. The parties present were: Colonel  
7 Lind; for the government Major Fein, Captains Morrow, Overgaard,  
8 Whyte, and Mitroka; for the defense, Captain Tooman and Mr. Coombs.  
9 And Major Hurley, telephonically participated.

10 The following topics were discussed and they are addressed  
11 more following below:

12 One, recording the R.C.M. 802;

13 Two, stipulations;

14 Three, the purpose of the present 802 conference;

15 Four, courtroom closure:

16 A. Evidence required to substantiate classification  
17 of the government's proper testimony;

18 B. Envisioned unclassified summaries of witness  
19 opinions appropriate for open session; and

20 C. Potential use of redacted transcript as a curative  
21 measure.

22 Five, the scheduling of the next *ex parte* session.

1           At the sessions conclusion the government had the following  
2 due outs:

3           One, provide substantiation of classification per piece of  
4 information to the Court for a *Grunden* hearing. A *Grunden* hearing is  
5 -- *Grunden* is a military case that discusses courtroom closures. The  
6 courtroom hearings in the military are normally referred to as  
7 *Grunden* hearings.

8           Two, provide the Court, as soon as possible, with the  
9 estimated time necessary to accomplish one above.

10          Three, provide draft closure orders to the Court based on  
11 one above.

12          Four, provide two draft closure orders to the Court to  
13 cover closure for testimony by the four special witnesses.

14          Five, provide the Court the unclassified, via NIPR e-mail,  
15 and classified, via SIPR e-mail, classification reviews.

16          Six, provide the name of witnesses the government -- of the  
17 witness the government will call as an example.

18          Seven, provide a plan on expeditious release of redacted  
19 versions of closed sessions.

20          At the session's conclusion the parties also agreed that no  
21 further argument was necessary on the Article 104 and 793(e) issues.  
22 The Court also noted the parties would want a ruling on the interplay  
23 between *Grunden*, M.R.E. 505, and R.C.M. 806.



1           One, recording the 802. As the Court did not have a  
2 reporter, she requested a participant record the proceedings.  
3 Captain Mitroka from the government complied. Neither party objected  
4 to a government assistant trial counsel fulfilling this function.

5           The Court noted that she believed that the issues for this  
6 802 would be discussed in a general and unclassified way. The  
7 parties were advised that should classified information need to be  
8 discussed, the telephonic line would need to be severed.

9           Two, stipulations. The parties alerted the Court via e-  
10 mail on 3 April 2013, that they continued to work on stipulations and  
11 intend to provide the Court an update by the end of the upcoming  
12 Article 39(a) session. Neither party objected to the Court ruling  
13 orally as opposed to in writing on this issue.

14           Three, the purpose of the present R.C.M. 802 conference.  
15 The prosecution expressed an interest in clarifying whether the  
16 present R.C.M. 802 would cover substantive content. The Court  
17 affirmed that while the 802 would address substantive content, the  
18 reason for the session was to ease the logistics of the *Grunden*  
19 ruling.

20           The Court confirmed that the summary of the 802 would be  
21 placed on the record, and neither party objected to proceeding in  
22 this matter.

23           Four, courtroom closure.

1           A. The prosecution articulated a two-fold objection to the  
2 defense's proposal of a sample witness. First, no other court has  
3 done this to consider closure for classified information, and second  
4 because of the different content and basis of witness testimony one  
5 witness would not be instructive as to the feasibility of  
6 alternatives for the other 27.

7           The government offered to go through the example of  
8 Article 32 closed session testimony to illustrate its points further.  
9 The defense argued that all reasonable alternatives needed to be  
10 considered and ruled out and that calling a witness was the only way  
11 to test the reasonableness of the alternatives; however, as this  
12 issue could not be resolved in time for the next session, and in  
13 light of the necessity of severing telephonic communication to  
14 discuss classified information, the Court indicated this substance  
15 could be discussed further at a later time.

16           The Court acknowledged that a proffer is not evidence. The  
17 Court and the parties confirmed, to their knowledge, *Grunden* and  
18 *Lonetree* were the only military cases involving a defense objection  
19 for court closure for classified information. The Court indicated it  
20 would not engage in comparing proper testimony to classification  
21 guides to confirm proper classification and the government explained  
22 that the classification guides were also provided for the Court's  
23 security officer to use during the trial. The Court, therefore,

1 ordered the government to provide further evidence to substantiate  
2 its assertion that the proffered areas of testimony for which the  
3 government is requesting closure are classified. The Court also  
4 ordered the government to provide a draft closure order, which  
5 connects each piece of classified information to the newly offered  
6 evidence, as well as to those witnesses who are anticipated to  
7 discuss it. The Court ordered the government to complete these tasks  
8 or to let the Court know if the completion was not possible by the  
9 next Article 39(a) session. The Court stated it would not make a  
10 ruling on the government's *Grunden's* motion until the Court had that  
11 information.

12           The Court confirmed that going witness by witness seemed  
13 the best way to provide the required information, but to let the  
14 Court know if the same witnesses were talking about the same -- if a  
15 number of different witnesses would be talking about the same  
16 classified information.

17           With regard to the proposed sample witness session, the  
18 defense noted that, for example, original classification authorities  
19 and sentencing witnesses would testify differently from one another,  
20 so sample witnesses should be included for different kinds of  
21 witnesses. The Court asked the government if the witnesses could be  
22 categorized. The government confirmed that they could be generally -  
23 - or generically, for example, witnesses who would testify as to

1 impact. The Court ultimately expressed an interest in hearing a  
2 sample merits witness who would offer testimony on the sort of  
3 information to which the others would testify.

4 The Court ordered the government to notify her of what  
5 witnesses by the end of the next Article 39(a) session -- of what the  
6 witness would be -- who the witness would be by the end of the next  
7 Article 39(a) session. Based on the defense's request, the Court may  
8 consider whether to have a sentencing witness at a later time.

9 The parties agree that this sample witness session should  
10 be conducted in a closed session. The defense indicated that it  
11 envisioned the government would go through a direct examination, then  
12 all the participants would consider how alternatives might be applied  
13 to the testimony. This process, the parties anticipate, could take  
14 up to 2 days. The government explained that because the defense's  
15 M.R.E. 505(h) notice had not processed, cross-examination would  
16 likely not be possible. The parties agree that, to the extent  
17 relevant, they would both subject the witness to a direct  
18 examination.

19 The government further noted that because of the equities  
20 involved and the fact that the witnesses belong to other government  
21 organizations, selecting a witness would require input from other  
22 entities. The government also raised the issue of whether or not the  
23 sample witness would be sworn to give his or her testimony.

1           Finally, the government sought clarification if there was  
2 no objection to courtroom closure for the entire testimony of the  
3 four special witnesses.

4           The defense confirmed they did not object to three of the  
5 four witnesses. Whether or not the defense would object to Mr. John  
6 Doe is still contingent upon relevance and further information as to  
7 the light disguise. The Court noted it would prepare an order for  
8 those four witnesses and that the government need only provide the  
9 requested information -- the government needed to provide the  
10 requested information as to the remaining 24 witnesses.

11           Due to potential scheduling conflicts, the date for the  
12 closed Article 39(a) session to explore the sample witness's  
13 testimony was not yet set. The parties indicated they could have  
14 more clarity by the coming Article 39(a) session on April 10th  
15 through 12th.

16           The government cited its 3 April 2013, filing as an example  
17 to the Court of where broad subject matter and analysis were  
18 discussed at an open session and the classified details of the  
19 testimony were discussed in the closed session during the Article 32  
20 hearing. The Court inquired whether the government foresaw making  
21 use of this alternative during the trial and, if so, how truncated  
22 these summaries would be. The government responded it did not  
23 foresee using unclassified summaries during the trial and the

1 specificity used in open session would track the specificity of the  
2 unclassified classification reviews previously provided to the Court.

3         The Court requested the government resend all the  
4 classification reviews to the Court and indicate the classification  
5 of each. The government also voiced its concern that the testimony  
6 of the 24 witnesses would be overly confusing and the equivalent of a  
7 closure if the Court uses a legend for the classified testimony. The  
8 government cited page 7 of the classified portion of the transcript  
9 of Enclosure 5, which was Special Agent Shaver's testimony, to its 3  
10 April 2013, filing as an example of what a closed session with a  
11 legend would look like using actual closed session testimony from the  
12 Article 32 Investigation to illustrate its points further.

13         The Court asked the government if the witness's testimony  
14 cited was different than all of the other witnesses'. The government  
15 agreed that Special Agent Shaver would be the only forensic examiner  
16 who would testify during closed session.

17         C. The Court said it was highly likely considering --  
18 highly considering employing the curative measure of making redacted  
19 transcripts of closed proceedings publicly available. The government  
20 confirmed this would require a classification review of the  
21 transcript as well as authentication. The Court and the parties  
22 discussed getting classified, closed sessions transcribed first and  
23 submitted for authentication and classification review

1 contemporaneously. The government estimated it could have a plan for  
2 this undertaking for the Court's review in 2 weeks.

3 Five, *ex parte* session. The government and the Court agree  
4 to hold their next *ex parte* session by close of business Wednesday,  
5 10 April 2013, that's today. The government stated that the extent  
6 of the defense's pretrial access to Mr. John Doe is contingent on the  
7 outcome of this session because assuming the Court rules in favor of  
8 the government, the government would then release its planned  
9 redacted and directed answers to the defense.

10 Does either side have any addition to the Court's summary  
11 of the R.C.M. 802 conference?

12 CDC[MR. COOMBS]: No, Your Honor.

13 TC[MAJ FEIN]: May be have a moment, Your Honor?

14 [Pause.]

15 TC[MAJ FEIN]: Ma'am, these are really just two -- I think just  
16 words got misplaced reading on the record. Four(b), the paragraph  
17 starting with the government cited its 3 April 2013, filing.

18 MJ: Mm-hmm.

19 TC[MAJ FEIN]: In the middle there, there's a sentence, Your  
20 Honor, "The government responded that it did foresee using  
21 unclassified summaries during trial." I think when the Court read it  
22 out loud it said "did not," but the government does foresee using  
23 unclassified summaries.

1 MJ: All right. Thank you for the clarification.

2 TC[MAJ FEIN]: Yes, ma'am. And the second is the very last  
3 paragraph 5, *ex parte* session. The government does intend, assuming  
4 the government -- or the Court rules in favor of the government's  
5 505(i) motion to give the full classified, not a redacted version to  
6 the defense. They'll get the entire.

7 MJ: All right. Thank you.

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: Just for the record, the *ex parte* sessions were held with  
10 respect to the government's M.R.E. 505(i) motion regarding the  
11 witness John Doe. We went over that at the last Article 39(a)  
12 session, the government had filed a request to have Mr. Doe testify  
13 in closed session in light disguise and to limit discovery and cross-  
14 examination for the defense.

15 I held an *ex parte* session with the government pursuant to  
16 Military Rule of Evidence 505(i) on the 8th of March 2013. I gave  
17 the government some guidance on how to proceed with some of the  
18 issues that the Court had some concerns with. The government gave me  
19 a status update on the 20th of March 2013, on how they had  
20 implemented that guidance and we'll be holding a second *ex parte*  
21 session with -- I'll be holding a second *ex parte* session with the  
22 government by close of business today to look at what they've done in  
23 accordance with my guidance for that motion.



1           Anything further on that issue?

2           TC[MAJ FEIN]: No, Your Honor.

3           CDC[MR. COOMBS]: No, Your Honor.

4           MJ: All right. The parties and I talked just prior to coming  
5 on today and the Court is going to actually come out with an order  
6 that sets forth for the record those things that -- the due outs that  
7 were discussed in the R.C.M. 802 conference, but one of the things  
8 that the Court is going to put in that order is the defense request  
9 for a dry run merits witness. The Court is going to grant that. The  
10 parties were advised of that at the R.C.M. 802 conference and have  
11 been conferring as to appropriate dates to make that happen. We have  
12 settled of the 7th and the 8th of May for that closed session. Now  
13 what, if anything else, is going to occur during that session is  
14 still up in the air, but right now, the only thing scheduled for that  
15 session is the closed session we're going to have with the dry run  
16 witness.

17           Does either side have anything further to add?

18           TC[MAJ FEIN]: No, Your Honor.

19           CDC[MR. COOMBS]: No, Your Honor.

20           MJ: All right. Is there anything else we need to address  
21 before we go into the -- the two issues in addition to all of the  
22 closure and the 505(i) motion, the two issues on the agenda from the  
23 Court are the government's motion under the documents--information

1 clause or 18 United States Code 793(e) and the defense motion to  
2 preclude evidence of actual receipt by the enemy under -- the Article  
3 104 aiding the enemy offense and the wanton disclosure Specification  
4 1 of Charge II.

5 Is there anything else we need to address before we go into  
6 those issues?

7 CDC[MR. COOMBS]: No, Your Honor.

8 TC[MAJ FEIN]: No, ma'am.

9 MJ: Let's begin with the government's motion, 18 United States  
10 Code Section 793(e). Both sides had earlier advised the Court that  
11 they did not want oral argument with respect to that motion. Is that  
12 still the case?

13 TC[MAJ FEIN]: Yes, Your Honor.

14 CDC[MR. COOMBS]: Yes, ma'am.

15 MJ: All right. In light of that, the Court's prepared to rule.

16 The government moves this Court to find that under the  
17 documents or tangible information clause of 18 United States Code  
18 Section 793(e) that the government is not required to prove that the  
19 accused "had reason to believe the information communicated could be  
20 used to the injury of the United States or the advantage of any  
21 foreign nation." Because this additional scienter requirement  
22 applies only to charged communications of intangible information, the  
23 defense opposes arguing that the charged communications are

1 intangible information and that the government is required to prove  
2 the additional "had reason to believe scienter" excuse me, scienter  
3 for both tangible and intangible information charged under the  
4 information clause.

5           After considering the pleadings, evidence presented and  
6 arguments of counsel -- I think you argued last time -- argument of  
7 counsel the Court finds and concludes the following:

8           Findings of fact: One, Title 18 United States Code Section  
9 793(e) penalizes in relevant part, "Whoever lawfully having  
10 possession of, access to, control over or being entrusted with any  
11 document, writing, code book, signal book, sketch, photograph,  
12 photographic negative, blue print, plan, map, model, instrument,  
13 appliance or note relating to the national defense, or information  
14 relating to the national defense, which information the possessor has  
15 reason to believe could be used to the injury of the United States or  
16 the advantage of any foreign nation, willfully communicates,  
17 delivers, transmits or causes to be communicated to any person not  
18 entitled to receive it or willfully retains the same and fails to  
19 deliver it on demand to the officer or employee of the United States  
20 entitled to receive it."

21           Two, the government has charged the 18 United States Code  
22 793(e) specifications of Charge II in relevant part as follows:

1           "The accused...having unauthorized possession of information  
2 relating to the national defense, to wit: Specification 2, a video  
3 file named '12 July 07 CZ Engagement Zone 30, GC Anyone.abi;'

4           Specification 3, more than one classified memorandum  
5 produced by a U.S. government intelligence agency.

6           Specification 5, more than 20 classified records from CIDNE  
7 Iraq Database.

8           Specification 7, more than 20 classified records from CIDNE  
9 Afghanistan Database.

10          Specification 9, more than three classified records from  
11 the U.S. Southern Command Database.

12          Specification 10, more than five classified records  
13 relating to a military operation in Farah Province, Afghanistan,  
14 occurring on or about 4 May 2009.

15          Specification 11, a file named 'BE22 PAX.zip' containing a  
16 file named 'BE22 PAX.wmv.'

17          And Specification 15, a classified record produced by a  
18 U.S. Army intelligence organization dated 18 March 2008.

19          With reason to believe such information could be used to  
20 the injury of the United States or the advantage of any foreign  
21 nation, willfully communicated...to a person not authorized to receive  
22 it."

1           Three, the government argues that despite the fact that the  
2 specifications include the additional "reason to believe" scienter,  
3 the government is required to prove this additional scienter  
4 requirement beyond a reasonable doubt only if the Court finds that  
5 the charged matter communicated is intangible information. If the  
6 Court finds the charged matter communicated is tangible information,  
7 then the government is not required to prove the reason to believe  
8 scienter beyond a reasonable doubt. The Court could except the  
9 additional reason to believe scienter language from the  
10 specifications and find the accused guilty of violating 18 United  
11 States Code Section 793(e) and Article 134, UCMJ under the "documents  
12 clause."

13           The Law. When interpreting statute the Court employs the  
14 following process:

15           One, give the terms of the statute their ordinary meaning  
16 if the terms are unambiguous.

17           Two, if the terms of the statute are ambiguous, then the  
18 Court examines the purpose of the statute and its legislative history  
19 to resolve the ambiguity.

20           Three, if a reasonable ambiguity still exists, the Court  
21 applies the rule of lenity and resolves the ambiguity in favor of the  
22 accused.

1           *United States v. Starr* 51 M.J. 528 at 532 Air Force Court  
2 of Criminal Appeals, 1999.

3           Conclusions of Law. One, 18 United States Code Section  
4 793(e) penalizes the willful communication of:

5           One, any document, writing, code book, signal book, sketch,  
6 photograph, photographic negative, blueprint, plan, map, model,  
7 instrument, appliance or note relating to the national defense; or

8           Two, information relating to the national defense which  
9 information the possessor has reason to believe could be used to the  
10 injury of the United States or the advantage of any foreign nation.

11           The Court refers to these clauses as the documents clause  
12 and the information clause, respectively. The Court also refers to  
13 "which information the possessor has reason to believe could be used  
14 to the injury of the United States or the advantage of any foreign  
15 nation," as the reason to believe scienter requirement.

16           Two, *The United States v. Rosen* was the first case -- was  
17 the first prosecution under 18 United States Code Section 793(e) of a  
18 person for the oral transmission of information related to the  
19 national defense: 446 F. Supp. 2d at 613, 614 Eastern District of  
20 Virginia, 2006. In addressing various constitutional challenges to  
21 the statute, *Rosen* found that information under 18 United States Code  
22 Section 793(e) is a general term that includes knowledge derived from  
23 both tangible and intangible sources. The *Rosen* Court looked to the

1 legislative history of 18 United States Code Section 793(e) and held  
2 that the reason to believe scienter requirement applies only to  
3 communication of intangible information and this heightened scienter  
4 also required the government to prove the defendant's bad faith to  
5 either harm the United States or to aide a foreign government: 445 F.  
6 Supp. 2d at 625 and 626.

7           Three, post *Rosen* courts addressing communication of  
8 information under 18 United States Code Section 793(e) have uniformly  
9 held the government is not required to prove that the defendant  
10 intended to harm the United States or aid a foreign government when  
11 the government charges communications under the information clause:  
12 *United States v. Diaz* 69 M.J. 127 Court of Appeals for the Armed  
13 Forces, 2010; *United States v. Steele* 2011 Westlaw 414, 992 Army  
14 Court of Criminal Appeals; *United States v. Kiriakou* 2012 Westlaw 490  
15 33 19 Eastern District of Virginia.

16           Four, 18 United States Code Section 793(e) is not  
17 ambiguous. It penalizes communications under the documents clause.  
18 Any document, writing, code book, signal book, sketch, photograph,  
19 photographic negative, blueprint, plan, map, model, instrument,  
20 appliance or note relating to the national defense or communications  
21 under the information clause: Information relating to the national  
22 defense, which the possession has reason to believe could be used to

1 the injury of the United States for the advantage of any foreign  
2 nation.

3 The information clause can include tangible and/or  
4 intangible information. There is no tangible information clause in  
5 18 United States Code Section 793(e).

6 Five, communications charged under the documents clause do  
7 not require the government to prove the additional reason to believe  
8 scienter requirement: *United States v. Drake* 818 F. Supp. 2d 909  
9 District of Maryland 2011, charged with retention of classified  
10 documents under the documents clause, reason to believe scienter not  
11 a required element. *United States v. Kim* 808 F. Supp. 2d 44 DDC  
12 2011, oral disclosure of classified information is intangible  
13 information. Congress's decision to impose a scienter requirement  
14 for the communication, delivery or transmission of information, but  
15 not for tangible items demonstrates that congress understood and  
16 embraced the distinction between the tangible items listed in the  
17 statute and intangible information.

18 Six, communications of tangible or intangible information  
19 charged under the information clause require the government to prove  
20 beyond a reasonable doubt the additional reason to believe scienter.  
21 *Diaz* 69 M.J. 130, that was printed list of detainees held at  
22 Guantanamo, tangible information. *Steele*, retained classified  
23 material, tangible information. *Kiriakou*, oral communication,



1 intangible information. "The parties contest what that heightened  
2 scienter requirement entails because the indictment specifically  
3 charges *Kiriakou* with violating the information clause, not the  
4 documents clause." *Drake* 818 at 916 and 917, "Thus, only the second  
5 information clause requires proof of the reason to believe element."

6           Seven, the government equates the documents clause and  
7 tangible information; they are not the same. It is possible that  
8 tangible information could also meet the definition of one or more of  
9 the series of terms which comprise the documents clause- "Any  
10 document, writing, codebook, signal book, sketch, photograph,  
11 photographic negative, blueprint, plan, map, model, instrument,  
12 appliance or note relating to the national defense." In such case  
13 the government can charge a violation of 18 United States Code  
14 Section 793(e) under the documents clause, no reason to believe  
15 scienter requirement, under the information clause, reason to believe  
16 scienter required or, in the alternative, if there was a concern that  
17 tangible information -- that the tangible information at issue might  
18 not qualify as any document, writing, codebook, signal book, sketch,  
19 photograph, photographic negative, blueprint, plan, map, model,  
20 instrument, appliance or note relating to the national defense in the  
21 documents clause.

22           Eight, in this case the matter constituting the charged  
23 communications in Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of

1 Charge II is tangible information. Actual physical matter, not oral  
2 communication was communicated. The government elected to charge the  
3 communications under the information clause. That clause carries  
4 with it the reason to believe scienter element. The government is  
5 required to prove beyond a reasonable doubt that the accused had  
6 reason to believe the communicated information could be used to the  
7 injury of the United States or to the advantage of any foreign nation  
8 for the accused to be found guilty of a violation of 18 United States  
9 Code Section 793(e) as charged in these specifications.

10 Ruling. Government motion for the Court to find that under  
11 the documents or tangible information clause of 18 United States Code  
12 Section 793(e), the government is not required to prove that the  
13 accused had reason to believe the information transmitted could be  
14 used to the injury of the United States or the advantage of any  
15 foreign nation. Because of this additional -- because this  
16 additional scienter requirement applies only to communications of  
17 intangible information is denied.

18 Please mark this as the next Appellate Exhibit in line  
19 [handing document to the court reporter.]

20 Is there anything further from either side with respect to  
21 this issue?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: The next issue on the agenda is the defense motion to  
2 preclude receipt by the enemy on the merits. Does either side desire  
3 oral argument with this?

4 CDC[MR. COOMBS]: No, Your Honor.

5 TC[MAJ FEIN]: No, Your Honor.

6 MJ: All right. The Court is prepared to rule on this issue as  
7 well, but I'm going to take a 10-minute recess to give my voice a  
8 rest.

9 Court is in recess.

10 **[The Article 39(a) session recessed at 1028, 10 April 2013.]**

11 **[The Article 39(a) session was called to order at 1043, 10 April**  
12 **2013.]**

13 MJ: This Article 39(a) session is called to order. Let the  
14 record reflect all parties present when court last recessed are again  
15 present in court.

16 The Court is prepared to rule on the defense motion to  
17 preclude evidence of receipt by the enemy on the merits.

18 The defense moves to preclude the government from raising  
19 or eliciting any discussion, reference or argument to include the  
20 introduction of any documentary or testimonial evidence relating to  
21 receipt by Al-Qaeda, Al-Qaeda in the Arabian Peninsula, the enemy  
22 listed in Bates number 00410660 to 00410664 or any other enemy during  
23 the merits portion of the trial. The defense argues that the

1 evidence is not relevant to any of the charged offenses and even if  
2 relevant, the probative value of receipt by the enemy is  
3 substantially outweighed by the danger of unfair prejudice, confusion  
4 of the issues or misleading the members or by considerations of undue  
5 delay, waste of time for needless presentation of cumulative evidence  
6 under Military Rule of Evidence 403.

7           The government opposes, arguing that this evidence is  
8 relevant to the Specification of Charge I, giving intelligence to the  
9 enemy, Article 104, UCMJ, and Specification 1 of Charge II, wanton  
10 publication of intelligence, Article 92, UCMJ.

11           At oral argument, the government also argued the evidence  
12 was relevant to the cause to be published element of Specification 1  
13 of Charge II. The government has not proffered this evidence for any  
14 other purpose.

15           During the Article 39(a) session from 26 February through 1  
16 March 2013, the Court invited the parties to file targeted briefs on  
17 receipt of intelligence as a requirement for the offense of giving  
18 intelligence to the enemy. On 29 March 2013, the government filed a  
19 targeted brief. On 1 April 2013, the defense advised the Court that  
20 the defense would not be filing a targeted brief.

21           After considering the pleadings, evidence presented and  
22 argument of counsel, the Court finds and concludes the following:

23           Findings of fact:

1           One, the charges and -- the Court's instructions for the  
2 Charge of knowing giving intelligence to the enemy as charged in the  
3 Specification of Charge I are:

4           Charge I, aiding the enemy. In the Specification of Charge  
5 I the accused is charged with the offense of aiding the enemy by  
6 giving intelligence to the enemy in violation of Article 104, UCMJ.  
7 In order to find the accused guilty of this offense you must be  
8 convinced by legal and competent evidence beyond a reasonable doubt:

9           One, that at or near Contingency Operating Station Hammer,  
10 Iraq, between on or about 1 November 2009 and on or about 27 May  
11 2010, the accused, without proper authority, knowingly gave  
12 intelligence information to certain persons, namely Al-Qaeda, Al-  
13 Qaeda in the Arabian Peninsula and an entity specified in Bates  
14 number 00410660 through 00410664, classified entity;

15           Two, that the accused did so by indirect means, to wit:  
16 transmitting certain intelligence specified in a separate classified  
17 document to the enemy through the WikiLeaks website;

18           Three, that Al-Qaeda, Al-Qaeda in the Arabian Peninsula and  
19 Bates number 0041060 -- 660 through 0041664, classified entity, was  
20 an enemy; and

21           Four, that this intelligence information was true at least  
22 in part.

1           "Intelligence" means any helpful information given to and  
2 received by the enemy, which is true at least in part.

3           "Enemy" includes not only organized forces in a time of  
4 war, but also any hostile body that our forces may be opposing such  
5 as a rebellious mob or a band of renegades, and includes civilians as  
6 well as members of military organizations. Enemy is not restricted  
7 to the enemy government or its armed forces, all the citizen of one  
8 belligerent or enemies of the government and the citizens of the  
9 other.

10          "Indirect means" means that the accused knowingly gave  
11 intelligence to the enemy through a third party, an intermediary or  
12 in some other indirect way. "Knowingly" requires actual knowledge  
13 by the accused that by giving the intelligence to the third party or  
14 intermediary or in some other direct way, that he was actually giving  
15 intelligence to the enemy through this indirect means.

16          This offense that the accused had a general evil intent and  
17 that the accused had to know that he was dealing directly or  
18 indirectly with an enemy of the United States.

19          "Knowingly" means to act voluntarily or deliberately. A  
20 person cannot violate Article 104 by committing an act inadvertently,  
21 accidentally, or negligently that has the effect of aiding the enemy.

22          Two, the definition of intelligence in this instruction is  
23 taken from the Military Judge's *Benchbook*, United States Department

1 of the Army Pamphlet 27-10 -- 27-9, excuse me, at 3-28-4(d), 1  
2 January 2010, here and after referred to as the *Benchbook*.

3           Three, defense argues that the *Benchbook* instruction is an  
4 inaccurate statement of the law and points to the language in Article  
5 104, UCMJ, and the elements and definition. The defense posets that  
6 giving intelligence to the enemy is a subset of communicating or  
7 corresponding with the enemy under Article 104(2).

8           The defense relies on Article 104(c)5(a) that giving  
9 intelligence to the enemy is a particular case of corresponding with  
10 the enemy, made more serious by the fact that the communication  
11 contains intelligence. It focuses on the explanation in Article  
12 104(c)6(a), that no response or receipt by the enemy is required and  
13 relies on *United States v. Olson* 7 U.S.C.MA 460, Court of Military  
14 Appeals, 1957.

15           In its discussion of a previous version of *the Manual for*  
16 *Court's-Martial* that the prohibition lies against any method of  
17 communication whatsoever and the offense is complete the moment the  
18 communication issues from the accused whether it reaches its  
19 destination or not: *Olson* at 467, 68.

20           Defense further contends that allowing evidence of actual  
21 receipt by the enemy will sidetrack and unnecessarily delay the  
22 trial.

1 Four, the defense describes intelligence as a noun, such  
2 that the Court's proposed instruction defining intelligence conflates  
3 defining intelligence with knowingly giving. The government agrees.

4 Five, the government contends the evidence is relevant and  
5 neither cumulative nor unfairly prejudicial. It further contends  
6 receipt by -- of intelligence by the enemy is a definitional  
7 requirement of intelligence citing R.C.M. 70 -- 307(c)3, defining a  
8 specification as a plain, concise and definite statement of the  
9 essential facts constituting the offense charged.

10 The government cites the *Benchbook* for the definition of  
11 intelligence and asserts William Winthrop *Military Law and*  
12 *Precedence*, 634 2d edition, 1920 reprint as compelling legal  
13 authority that "of specific instances of a direct violation of giving  
14 intelligence to the enemy...it is necessary that the enemy shall have  
15 been actually informed." The government notes the Supreme Court and  
16 the Court of Military Appeals have relied on Winthrop as authority in  
17 UCMJ history: *Hamdan v. Rumsfeld* 548 U.S. 557, 597 2006; *US v.*  
18 *Batchelor* 7 U.S.C.MA 354 at 368, 1956.

19 The government contends that giving intelligence to the  
20 enemy is a separate and distinct crime from communicating with the  
21 enemy, citing *United States v. Anderson* 68 M.J. 378 at 385 Court of  
22 Appeals for the Armed Forces 2010, and *United States v. Dickerson* 7  
23 U.S.C.MA 438 Court of Military Appeals 1955.



1           The law -- excuse me Six, Specification 1 of Charge II  
2 alleges wrongful and wanton causing to be published on the Internet  
3 intelligence belonging to the United State Government, having  
4 knowledge that intelligence published on the Internet is accessible  
5 to the enemy, in violation of Article 92 -- excuse me, in violation  
6 of Article 134. The government asserts the evidence that the enemy  
7 received and downloaded the intelligence is relevant to prove that  
8 the accused caused to be published the intelligence.

9           The law. One, Military Rule of Evidence 401 defines  
10 relevant evidence; "relevant evidence" means evidence having any  
11 tendency to make the existence of any fact that is of consequence to  
12 the determination of the action more or less probable than it would  
13 be without the evidence. A military judge has the responsibility to  
14 determine whether evidence is relevant under R.C.M. 401: *U.S. v.*  
15 *White* 69 M.J. 236 Court of Appeals for the Armed Forces 2010.

16           Two, M.R.E. 402 provides that all relevant evidence is  
17 admissible except as otherwise provided by the Constitution of the  
18 United States as applied to members of the Armed Forces, the Code,  
19 these rules, this manual or any act of Congress applicable to members  
20 of the Armed Forces. Evidence that is not relevant is not  
21 admissible.

22           Three, relevant evidence is necessary when it's not  
23 cumulative and when it would contribute to a party's presentation of

1 the case in some positive way in a matter at issue. A matter is not  
2 an issue when it's stipulated as fact: R.C.M. -- discussion to  
3 R.C.M. 703(b) (1).

4 Four, R.C.M. -- M.R.E. 403 provides that relevant evidence  
5 may be excluded if it's probative value is substantially outweighed  
6 by the danger of unfair prejudice, confusion of the issues or  
7 misleading the members, or by considerations of undue delay, waste of  
8 time or needless presentation of cumulative evidence.

9 Five, Article 104, UCMJ, penalizes in pertinent part any  
10 person who without proper authority knowing harbors or protects or  
11 give intelligence to or communicates or correspondence with or holds  
12 any intercourse with the enemy, either directly or indirectly.

13 Six, in the MCM, *Manual for Court's-Martial*, page 4-21,  
14 paragraph 28, the President has delineated separate elements and  
15 definitions for the offenses of giving intelligence to the enemy and  
16 communicating with the enemy.

17 Seven, in paragraph 28(c) (5), the nature of the offense  
18 giving intelligence to the enemy is explained as "a particular case  
19 of corresponding with the enemy made more serious by the fact that  
20 the communication contains intelligence that may be useful to the  
21 enemy for any of the many reasons that make information valuable to  
22 belligerents."

Eight, in paragraph 28(c)(6), the nature of the offense communicating with the enemy is explained as, "No authorized communication, correspondence or intercourse with the enemy is permissible. The intent, content and method of the communication, correspondence or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence or intercourse issues from the accused."

Nine, the analysis to Article 104 in Appendix 23, *Manual for Court's-Martial* states that it is based on Paragraph 183 of the 1969 Manual and cites *United States v. Olson* 7 U.S.C.MA 460 Court of Military Appeals 1957; *United States v. Batchelor* 7 U.S.C.MA 5 -- 354 Court of Military Appeals 1956; and *United States v. Dickerson* 7 U.S.C.MA 438 Court of Military Appeals 1955.

Ten, the Manual lists attempts as a lesser included offense (LIO) for both giving intelligence to the enemy and for communicating with the enemy. It does not list either offense as an LIO of the other.

Eleven, in *Batchelor* the Court of Military Appeals acknowledged Colonel William Winthrop as "probably the most respected early writer in the field of military law," and his "learned treatise" cited in support of holding "that Article 104(2) of the Code does not require a special criminal intent of any sort." The

1 Court of Military Appeals went on to note that the government is not  
2 prohibited "from over proving its case in prosecutions under Article  
3 104," at 368.

4 The United States Supreme Court has referred to Winthrop as  
5 the "Blackstone of Military Law," *Hamdan v. Rumsfeld* 548 U.S. 557 at  
6 597 2006; quoting *Reid v. Covert* 354 U.S. 1 at 19 note 38 1957.

7 Twelve, Winthrop defines the offense of giving intelligence  
8 to the enemy as follows:

9 Giving intelligence to the enemy, this offense will consist  
10 in communicating to the enemy by personal statement, message, letter,  
11 signal or otherwise information in regard to the number, condition,  
12 position or movement of the troops, amount of supplies, acts or  
13 projects of the government in connection with the law of war or any  
14 other fact or matter that may assist him in the prosecution of  
15 hostilities. It is necessary that the enemy shall have been actually  
16 informed. If, therefore, the intelligence fails to reach him this  
17 offense is not completed, although the offense of holding  
18 correspondence may be.

19 It would seem that the facts communicated should be part --  
20 in part at least true, since if they are entirely false, intelligence  
21 cannot be said to have been given. William Winthrop *Military Law and*  
22 *Precedence* 634 2d Edition, 1920 reprint, emphasis and original.

Thirteen, while military judges are encouraged not to significantly deviate from standard instructions found in the Military Judge's *Benchbook*, the standard instructions are not sacrosanct: *United States v. Staton* 68 M.J. 569 Air Force Court of Criminal Appeals 2009. Upholding deviations conforming to current case law.

Because the standard *Benchbook* instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record: *United States v. Rush* 51 M.J. 605 at 609 Army Court of Criminal Appeals 1999.

Conclusions of law. One, Article 104 includes elements for five separate offenses: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy and communicating with the enemy. Each of these offenses is distinct and separate from the other offenses: *United States v. Anderson* 68 M.J. 378 Court of Appeals for the Armed Forces; quoting *United States v. Dickerson* 6 CMA 438 Court of Military Appeals 1955.

The statutory language Article 104 UCMJ is silent with respect to whether response or receipt by the enemy is required for the offenses of communicating with the enemy and giving intelligence to the enemy -- well, excuse me, with the effect of the offense of

1 giving intelligence to the enemy. In the MCM the president explained  
2 that the offense of communicating with the enemy is complete the  
3 moment the communication, correspondence or intercourse issues from  
4 the accused, *Manual for Court's-Martial* 4-41, paragraph 28(c)6a.

5           The explanation for the offense of giving intelligence to  
6 the enemy does not state that the giving of intelligence is complete  
7 the moment the giving issues from the accused. This distinction is  
8 consistent with Winthrop's explanation of the distinctions between  
9 the two offenses and a Judge Advocate General opinion regarding  
10 Article 46 of the American Articles of War in 1874, the version of  
11 the offense of aiding the enemy and effect at the time: William  
12 Winthrop *Military Law and Precedence* 633, 634 2d Edition, 1920  
13 reprint; William Winthrop *Digest of Opinions of the Judge Advocates*  
14 *General of the Army* with notes 41, 42, 1895.

15           Three, aiding the enemy has been an offense in military  
16 code since the American Articles of War in 1775: *U.S. v. Batchelor* 22  
17 CMR 144 at 158 Court of Military Appeals 1956, "This provision,  
18 Article 104, is not new or novel, for it was taken with only minor  
19 changes from Article of War 81, 10 United States Code Section  
20 1553...Indeed the present enactment bears a striking resemblance to  
21 Article 28, American Articles of War 1775, which provided whosoever  
22 belonging to the Continental Army shall be convicted of holding  
23 correspondence with or giving intelligence to the enemy, either

1 directly or indirectly, shall suffer punishment as by a General  
2 Court-Martial shall be ordered."

3         The gist of this penal statute has appeared in every  
4 military code since that time. See Article 46, American Articles of  
5 War, 1874; Article 81, Articles of War, 1916 and 1920.

6         *Batchelor* went on to describe Winthrop as "probably the  
7 most respected early writer in the field of military law." The Court  
8 relied on Winthrop's interpretation of Article 46, the predecessor to  
9 Article 104, UCMJ, as defined in the 1951 *Manual for Court's-Martial*.

10         Four, the defense relies upon *United States v. Olson* 22 CMR  
11 250 Court of Military Appeals 1957, to show that the offense of  
12 communicating with the enemy has been interpreted consistently so as  
13 to require absolutely non intercourse since early times, end at 467.  
14 *Olson* does not address the separate offense of giving intelligence to  
15 the enemy at issue in this case.

16         Five, the 1951 Article 104, UCMJ, is nearly identical to  
17 the current Article 104, UCMJ. There has been no legislative,  
18 executive or case law history since *Batchelor* that indicates any  
19 intent by Congress, the President or the Court's to interpret Article  
20 104 inconsistently with its history as described by Winthrop and  
21 relied upon in *Batchelor* to interpret the statute.

22         The President has retained the distinction between  
23 communicating intelligence to the enemy, an offense complete at the

1 moment the communication issues, and giving intelligence to the  
2 enemy. No provision of the offense is complete when the giving  
3 issues. Furthermore, the standard instructions for Article 104 and  
4 the *Benchbook* invoke the same distinction and are consistent with  
5 Winthrop, with the definition requiring that intelligence means any  
6 helpful information to -- given to and received by the enemy, which  
7 is true at least in part.

8           Six, the offense of Article 104, giving intelligence to the  
9 enemy, requires the government to prove beyond a reasonable doubt  
10 that the intelligence was actually received by the enemy.

11           Seven, the Court agrees with the parties that intelligence  
12 is a noun and as such the current *Benchbook* in the Court's  
13 instructions, "Intelligence means any helpful information given to  
14 and received by the enemy which is true at least in part," is  
15 awkward. The Court will reword the instruction to read,  
16 "Intelligence means any information that is helpful to the enemy and  
17 which is true at least in part. To find the accused guilty of this  
18 offense, the government must prove beyond a reasonable doubt that the  
19 intelligence was given to and received by the enemy."

20           Eight, even if receipt by the enemy was not required,  
21 evidence of the circumstances surrounding the receipt by the enemy is  
22 relevant to the element of whether the accused knowingly gave  
23 intelligence to the enemy for the specification of Charge I, aiding



1 the enemy. Evidence of the path of the intelligence from the accused  
2 to the enemy is circumstantial evidence relating -- relevant to prove  
3 whether the accused knew or did not know he was dealing with the  
4 enemy.

5           Nine, similarly, evidence of the circumstances surrounding  
6 the enemy's receipt of the intelligence is relevant to the caused to  
7 be published element of Specification 1 of Charge II, wanton  
8 publication. As the evidence is also relevant to another charge, the  
9 Court will not decide whether there could be less prejudicial  
10 evidence to establish this element.

11           Ten, the evidence at issue is not cumulative, it's  
12 probative value is not substantially outweighed by the danger of  
13 unfair prejudice, confusion of the issues or misleading the members,  
14 or by considerations of undue delay, waste of time or needless  
15 presentation of cumulative evidence. Allowing the evidence at issue  
16 will not sidetrack or unnecessarily delay the trial by shifting the  
17 focus to whether or not the enemy actually received the charged  
18 information. Unless the Court finds the probative value of the  
19 evidence is not substantially outweighed by the danger of unfair  
20 prejudice, confusion of the issues or misleading the members,  
21 presentation of the evidence will not cause undue delay, waste of  
22 time or needless presentation of cumulative evidence in accordance  
23 with M.R.E. 403.

1           Ruling. The defense motion to preclude the government from  
2 raising or eliciting any discussion, records or argument to include  
3 the introduction of any evidence relating to the receipt of charged  
4 information by Al-Qaeda, Al-Qaeda in the Arabian Peninsula, the enemy  
5 listed in Bates Number 00410660 through 00410664 or any other enemy  
6 from the merits portion of the trial is denied. The Court's  
7 instructions regarding the Specification of Charge I will be amended  
8 at stated in this ruling. So ordered this 10th day of April 2013.

9           Does either side desire anything further with respect to  
10 this ruling?

11         CDC[MR. COOMBS]: No, Your Honor.

12         TC:[MAJ FEIN]: No, Your Honor.

13         MJ: Have it marked as the next Appellate Exhibit in line.

14         [The ruling was so marked]

15         MJ: All right. My notes indicate that what we have left is the  
16 Court is preparing, as I said, a draft closure -- draft order with  
17 respect to the things that were discussed in the R.C.M. 802  
18 conference. I'm going to need a little time with that. We have the  
19 M.R.E. 505(i) hearing. Is there anything else we need to litigate at  
20 this session.

21         TC[MAJ FEIN]: Ma'am, when you said 505(i) hearing, you mean the  
22 ex parte session?

23         MJ: Yes.

1 TC[MAJ FEIN]: No, ma'am. We -- the government also by lunch or  
2 during lunch will have the draft closure orders ready for the Court  
3 to review for the four witnesses.

4 MJ: I'm thinking the way to do this best might be to do the  
5 505(i) hearing, taking lunch and then come back on the record and  
6 I'll be able to look at your closure orders as well and you can get  
7 the copy to the defense and then address those orders and then the  
8 Court will have a little bit of time to do what I need to do with  
9 respect to the draft order from the R.C.M. 802 conference. If we  
10 reconvened later this afternoon, would that work for the parties?

11 CDC[MR. COOMBS]: Yes, Your Honor.

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: I'm thinking something to the effect of 1500ish?

14 TC[MAJ FEIN]: Yes, ma'am.

15 CDC[MR. COOMBS]: Yes, Your Honor.

16 MJ: All right. So, how long will it take the government to be  
17 prepared for that M.R.E. 505(i) hearing and to give the Court and the  
18 defense the draft orders?

19 TC[MAJ FEIN]: Ma'am, may we have an in place recess?

20 MJ: Yes.

21 [There was a pause while the trial counselors conferred.]

1 TC[MAJ FEIN]: Ma'am, no more than 20 minutes. I -- we could  
2 let the Court know only because we have to set the court reporter  
3 equipment up; otherwise, the government will be ready, Your Honor.

4 MJ: All right. Is there anything else we need to address  
5 before we recess the Court?

6 CDC[MR. COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: All right. Court is in recess. We will reconvene at 1500.

9 **[The Article 39(a) session recessed at 1106, 10 April 2013.]**

10 **[END OF PAGE]**

Pages 7058 through 7080 of this transcript are classified “SECRET”. This session (10 April 2013, Session 1) is sealed for Reasons 2 and 4, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

1 [The Article 39(a) session was called to order at 1531, 10 April  
2 2013.]

3 MJ: This Article 39(a) session is called to order.

4 Let the record reflect all parties present when the Court  
5 last recessed are again present in court.

6 During the recess, I held a second *ex parte* Article 39(a)  
7 session with the government with respect to the government's Military  
8 Rule of Evidence 505(i) motion for the witness John Doe. That *ex*  
9 *parte* session involved the defense discovery issues.

10 Does either side have anything they would like to present  
11 at this time with respect to any of the motions that have been filed  
12 with respect to the interplay between M.R.E. 505(i) and the Rule for  
13 Closure under R.C.M. 806(b) or the government's 505(i) motion with  
14 respect to John Doe or their omnibus closure motion with respect to  
15 the three classified witnesses, John Doe and the 24 other witnesses?

16 CDC[MR. COOMBS]: No, ma'am.

17 TC[MAJ FEIN]: No, ma'am, with one exception. After the *ex*  
18 *parte* session that you just discussed on the record, the government  
19 went back and at about 1430 today disclosed the three documents that  
20 were subject to that motion or that hearing, excuse me, to the  
21 defense. They have two copies of those three document in their  
22 possession.

1 MJ: Thank you. I'm going to announce the ruling of the Court.  
2 I've sort of got a big omnibus ruling here that takes care of all of  
3 those issues. After that, the parties and I spoke at an R.C.M. 802  
4 conference and discussed some follow on actions that will make more  
5 sense after I announce the ruling to you.

6 Ruling and order, interplay between Military Rule of  
7 Evidence 505, R.C.M. 806 and *United States v. Grunden*, Specificity of  
8 Classified Information and John Doe.

9 Motion One. The government moves this Court to find that  
10 M.R.E. 505(i) classified information and R.C.M. 806 operate  
11 independently of each other, although both rules address the use of  
12 classified information during a court-martial trial. The defense  
13 opposes and moves the Court to require the procedures in M.R.E.  
14 505(i) be followed when making closure determinations in accordance  
15 with Rule for Court-Martial 806(b)(2).

16 Motion Two. On 15 March 2013, the government provided the  
17 Court and the defense with a supplement to Prosecution Response to  
18 Scheduling Order 39(a) Session on Closure and Motion to Close the  
19 Courtroom for Specified Testimony. On 28 March 2013, the defense  
20 moved the Court to order the government to provide more specificity  
21 regarding the classified information it seeks to elicit during the  
22 trial -- during the closed session. The defense also moved the Court  
23 to order the government to produce a merits witness and a sentencing

1 witness to go through a "dry run" of the classified testimony in a  
2 closed Article 39(a) session to address whether there are reasonable  
3 alternatives to closure available.

4 Motion Three. On 31 January 2013, the government moved for  
5 an *in camera* proceeding under Military Rule of Evidence 505(i)(2)  
6 regarding the witness John Doe to determining the necessity for  
7 moving the Court to order the following:

8 One, permit the witness to testify under the pseudonym John  
9 Doe, to testify in civilian clothing and light disguise, and to  
10 testify from an alternate location in a closed session.

11 Two, limit discovery and cross-examination regarding  
12 information that could reveal the witness's true identity.

13 And three, limit discovery and cross-examination by  
14 precluding the defense from questioning the witness regarding  
15 irrelevant and highly classified information including his training  
16 for a specific classified mission, preparation for the mission or  
17 details of the mission's execution outside the scope of direct  
18 examination.

19 After considering the filings by the parties and oral  
20 argument, the Court finds and rules and orders as follows:

21 Findings of fact and the law:



1           One, the accused has a Sixth Amendment right to a public  
2 trial: *Waller v. Georgia* 467 U.S. 39 1984; *U.S. v. Ortiz* 66 M.J. 334  
3 Court of Appeals for the Armed Forces 2008.

4           The public has a First Amendment right to attend public --  
5 criminal trials: *Press Enterprise Company v. Superior Court of*  
6 *California Riverside County* 464 U.S. 501 1984; *Howell v. McKinney* 47  
7 M.J. 363 Court of Appeals for the Armed Forces 1997.

8           Trial courts are obligated to take every reasonable measure  
9 to accommodate public attendance at criminal trials to include  
10 considering alternatives to closure even when they are not requested  
11 by the parties: *Presley v. Georgia* 558 U.S. 209 2010.

12           Two, the values enhanced by the requirement are to:

13           One, inspire public confidence that the accused is fairly  
14 dealt with and not unjustly condemned; two, impress upon trial  
15 participants the importance of their function and the importance of  
16 carrying out their duties responsibility; three, encourage witnesses  
17 to come forward; and four, to discourage perjury: *Waller*, 467 U.S.  
18 at 46.

19           Openness enhances both a basic fairness of the criminal  
20 trial and the appearance of fairness so essential to public  
21 confidence in the criminal justice system: *Press Enterprise*, 464 U.S.  
22 at 506 to 509.

1           Three, before the Military Rules of Evidence were enacted  
2 in 1980, military case law allowed closure of courts-martial for  
3 portions of the trial where classified information was to be  
4 disclosed: *U.S. v. Grunden* 2 M.J. 116 Court of Military Appeals 1977,  
5 established the test for such closures.

6           Under the current rules, Military Rule of Evidence 505  
7 governs the use of classified information at trial. M.R.E. 505(i),  
8 which are in camera proceedings for cases involving classified  
9 information authorizes in camera proceedings to address the use at  
10 any proceeding of any classified information. M.R.E. 505(j) governs  
11 the introduction of classified information into evidence at trial.  
12 M.R.E. 505(j)(5) closed session provides that the military judge may  
13 exclude the public during that portion of the presentation of  
14 evidence that discloses classified information.

15           Five, R.C.M. 806 establishes the standards for closure for  
16 trial for any reason to include the protection of classified  
17 information.

18           Six, prior to its amendment in 2004, R.C.M. 806(b) provided  
19 in relevant part that "A session may be closed over the objection of  
20 the accused only when expressly authorized by another provision of  
21 this manual." The discussion to the rule explained that "A session  
22 may be closed without the consent of the accused only under an M.R.E.  
23 412(c), 505(i) and (j) or 506(i). This authorization of trial

1 closure failed to apply the constitutional tests set forth in *Waller*  
2 and *Press Enterprise* and adopted by the Court of Appeals for the  
3 Armed Forces in *United States v. Hershey* 20 M.J. 433 at 436 Court of  
4 Military Appeals 1985.

5           Seven, in 2004, R.C.M. 806(b)(2) was amended to incorporate  
6 the constitutional test for trial closure. The rule provides that  
7 trial "Shall be open to the public unless: one, there is a  
8 substantial probability that an overriding interest will be  
9 prejudiced if the proceedings remain open; two, closure if no broader  
10 than necessary to protect that overriding interest; three, reasonable  
11 alternatives to closure were considered and found inadequate; and  
12 four, the military judge makes case specific findings on the record  
13 justifying closure."

14           Eight, the Court of Appeals for the Armed Forces (CAAF) has  
15 recognized that the protection of classified information can be an  
16 overriding interest that will be prejudiced if the proceedings remain  
17 open: *United States v. Lonetree* 31 M.J. 849 Navy Marine Court of  
18 Military Review 1990, affirmed 35 M.J. 396 Court of Appeals for the  
19 Armed Forces 1992; and *United States v. Grunden* 2 M.J. 116 Court of  
20 Military Appeals 1997.

21           Nine, where the identity of a witness is classified or the  
22 government proves that the witness's personal safety would be at risk  
23 if his identity is disclosed at trial, the Sixth Amendment allows the

1 government to withhold the identity of the witness and to allow the  
2 witness to testify in light disguise so long as the defense is able  
3 to place the witness in his proper setting: *United States v.*  
4 *Lonetree* 35 M.J. 396 Court of Military Appeals 1992.

5           Ten, in the government's 15 March 2013, classified filing:  
6 Supplement to Prosecution Response for Scheduling Order 39(a) Session  
7 on Closure and Motion to Close Courtroom for Specified Testimony, the  
8 government describes the classified information it moves to illicit  
9 in closed session for the following witness: One, Brigadier General  
10 (retired) Robert Carr, DIA; two, Colonel Julian Chesnutt, DIA; three,  
11 classified witness entirety; four, Miss Elizabeth Dibble, Department  
12 of State, Principle Deputy Assistant Secretary, Bureau of Near  
13 Eastern Affairs; five John Doe, entire; six, Rear Admiral Kevin  
14 Donegan, Naval Warfare Integration Pentagon; seven, Mr. John Feeley,  
15 Principle Deputy Assistant Secretary, Bureau of Western Hemisphere  
16 Affairs, Department of State; eight, Ambassador Patrick F. Kennedy,  
17 Under Secretary for Management, Department of State; nine, Mr. John  
18 Kirchhofer, DIA; ten, Ambassador Michael Kozak, Department of State;  
19 eleven, classified witness entirety; twelve, Mr. Danny Lewis, DIA;  
20 thirteen, Mr. Randal MacRobbie, DIA; fourteen, Mr. James McCarl,  
21 Joint IED Defeat Organization (JIEDDO); fifteen, Major General  
22 Kenneth McKenzie, USMC Headquarters staff; sixteen, Mr. James Moore,  
23 Department of State; seventeen, Major General Michael Nagata, Joint

1 Staff, Pentagon; eighteen, SSA Alexander Otte, FBI; nineteen,  
2 Ambassador David Pearce, Department of State; twenty, Mr. Adam  
3 Pearson, JIEDDO; twenty-one, Mr. H. Dean Pittman, Department of State;  
4 twenty-two classified witness in entirety; twenty-three, Ambassador Stephen  
5 Seche, DoS; twenty-four, Mr. David Shaver, US Department of Treasury;  
6 twenty-five, Mr. Catherine Strobels, CIA; twenty-six, Ambassador Don  
7 Yamamoto, Department of State; twenty-seven, Ambassador Marie Yovanovitch,  
8 Department of State; and twenty-eight, Mr. Joseph Yun, Department of State.

9           Eleven, on 4 April 2013, the Court held an R.C.M. 802 conference  
10 with the parties to discuss the motions at issue in this case and scheduling  
11 issues involved in implementing this order. At that R.C.M. 802 conference  
12 the defense advised the Court it did not object to closure for the three  
13 classified witnesses or for John Doe, and did not object to John Doe  
14 testifying at an alternative location or in light disguise, in civilian  
15 clothing so long as the light disguise allows the defense to observe John  
16 Doe's demeanor. The substance of that R.C.M. 802 is documented by an e-mail  
17 and it has been read on the record.

18           Conclusions of law.

19           One, M.R.E. 505(i) authorizes the government to request an *in*  
20 *camera* proceeding to determine whether classified information may be used by  
21 the -- may be disclosed either to the accused in discovery or used during  
22 the trial.

23           Two, M.R.E. 505(j) governs the introduction of classified  
24 information into evidence in the trial. M.R.E. 505(j) (5) authorizes

1 military judges to close the trial during that portion of the presentation  
2 of evidence that discloses classified information.

3           Three, the First and Sixth Amendment rights to a public trial  
4 require the judges to employ the constitutional test for closure in  
5 accordance with R.C.M. 806(b)(2) prior to closing any portion of the trial  
6 in accordance with M.R.E. 505(j)(5).

7           Four, the requirements of M.R.E. 505(i) are not applicable when  
8 the government requests closure of a portion of the trial or an Article  
9 39(a) session in accordance with R.C.M. 806(b)(2). Where the basis of the  
10 closure is to protect national security by preventing disclosure of  
11 classified information, the government must identify the particular  
12 classification -- classified information at issue to the defense and the  
13 court with sufficient specificity to allow the defense to propose  
14 alternatives and to challenge closure and to provide the Court with  
15 sufficient information to apply the R.C.M. 806 test and determine whether  
16 there is a substantial probability that an overriding interest would be  
17 prejudice if the procedure -- proceedings remain open; two, closure is no  
18 broader than necessary to protect that overriding interest; three, whether  
19 there are reasonable alternatives to closure and that they have been  
20 considered and found inadequate; and four, to make case specific findings on  
21 the record justifying closure.

22           The government must also provide the Court with evidence that the  
23 information it seeks to qualify as an overriding interest requiring  
24 protection by closure is properly classified.

1           Five, the Court has examined the government's 15 March 2013,  
2   classified supplement to Prosecution Response to Scheduling Order 39(a)  
3   Session on Closure and Motion to Close the Courtroom for specified  
4   testimony. The description of the classified information the government  
5   seeks to elicit during the closed session for each of the identified  
6   witnesses is sufficiently specific for the defense to challenge closure and  
7   to propose reasonable alternatives to closure. Although the description of  
8   the classified information is sufficient -- sufficiently specific, the  
9   government has not provided the Court with evidence of the classified nature  
10  for all of the classified information at issue to allow the Court to  
11  properly apply the R.C.M. 806(b)(2) test and to make appropriate case  
12  specific findings.

13           Six, one alternative that can mitigate the impact of closure is  
14  for the Court to require the government to transcribe closed sessions first,  
15  conduct the appropriate classification reviews on the transcribed record and  
16  to release the redacted unclassified portion of the transcript of the closed  
17  session to the public.

18           Seven, the Court has examined the classified government motion  
19  for in camera proceeding under M.R.E. 505(i)(2) and the enclosures to  
20  include enclosures 10, 12 and 13. The Court has held two in camera Article  
21  39(a) session with the government to address defense discovery issues. The  
22  government proposes to give the defense a written copy of the government's  
23  proposed direct examination of John Doe and the anticipated responses:  
24  Enclosure 10. The government also proposes to provide the defense a summary  
25  of relevant discovery: Enclosure 9, in part and Enclosure 13. The Court

1 finds that these disclosures are sufficient to allow the defense to place  
2 the witness in his proper setting.

3 Ruling. The defense motions to require the use of the procedures  
4 in M.R.E. 505(i) for proceedings addressing closure determinations under  
5 R.C.M. 806(b)(2) and for the government to provide more specificity to the  
6 defense regarding the classified information proposed for disclosure are  
7 denied.

8 The defense motion to produce a "dry run" government merits  
9 witness to testify in a closed Article 39(a) session to assist the Court in  
10 determining if there are reasonable alternatives to closure is granted.

11 The government motion to permit a classified witness to testify  
12 pseudonym John Doe, to testify in civilian clothing, in light disguise and  
13 to testify from an alternative location in a closed session is granted, so  
14 long as the light disguise allows the defense to observe the witness's  
15 demeanor, body language, eye movements and facial reactions.

16 The government motion to limit discovery and cross-examination  
17 regarding information that could reveal John Doe's true identity and  
18 preclude the defense from questing John Doe regarding irrelevant and highly  
19 prejudicial classified -- highly classified information including his  
20 training for a specific classified mission, preparation for the mission or  
21 details of the missions execution outside the scope of direct examination is  
22 granted. The Court will set forth its R.C.M. 806(b)(2) closure findings for  
23 this witness in a separate ruling.

24 Order. No later than 7 May -- One, no later than 7 May 2013, the  
25 government will provide the Court with evidence of the classified nature of



1 each piece of classified information the government seeks to assert as an  
2 overriding interest justifying closure and with a draft order specifying the  
3 evidence for the specified classified information.

4 Two, no later than 12 April 2013, the government will provide the  
5 Court and the defense a status update on the progress made to identify a  
6 merits witness for whom the government seeks closure based on disclosure of  
7 classified information to be produced for a dry run of his or her testimony  
8 at the closed Article 39(a) session scheduled 7, 8 May 2013.

9 The parties have identified several witnesses who would testify  
10 similarly, but disclose different classified information; for example,  
11 original classification authorities. The witness produced will be one of  
12 those "categorical" witnesses. The witness will testify as he/she would at  
13 trial, in the closed session, to facilitate the Court's determination  
14 whether there are reasonable alternatives to closure.

15 Pursuant to R.C.M. 806(b)(2), the Court finds that closure of the  
16 Article 39(a) session is required to prevent disclosure of classified  
17 national security information from this witness, is narrowly tailored to  
18 closing only the out of court session intended to flush out the classified  
19 information at trial -- excuse me, the classified information involved, and  
20 to determine whether there are reasonable alternatives to closure of the  
21 same classified information at trial. The Court further finds there is not  
22 reasonable alternative to closure of this Article 39(a) session.

23 Three, no later than May 6, 2013, the government will provide the  
24 Court will a plan for expeditious transcription, authentication,

1 classification review and release of redacted versions of closed sessions to  
2 the public.

3 So ordered this 10th day of April, 2013.

4 Now, as I said earlier, the parties and I met in an R.C.M. 802  
5 conference briefly just before coming out in court today, and the government  
6 has already given the defense the discovery that I described in the ruling.

7 Major Fein, I know you've already said it once, but why don't you  
8 say it again? It may have more context now in light of the Court's ruling,  
9 what you gave the defense?

10 TC[MAJ FEIN]: Yes, ma'am. The United States produced to the defense  
11 in hard copy two full copies of the three documents the court referenced: a  
12 portion of Enclosure 9 to Appellate Exhibit 477; what is Enclosure 13, a  
13 summary discoverable information to the defense -- excuse me, Enclosure 32  
14 of Appellate Exhibit 477; and then a complete copy of our proposed direct  
15 examination with the proffered answers that John Doe would give during his  
16 testimony, that is Enclosure 10 to Appellate Exhibit 477.

17 MJ: All right. Defense, you made a proposal to me in the R.C.M. 802  
18 conference. I want to make sure that we put this on the record.

19 CDC[MR. COOMBS]: Yes, ma'am. We've had a chance to look at what the  
20 government has given us, and based upon that we do have questions. We  
21 propose that we draft those questions in the form of an interrogatory. We  
22 can have that for the government by the 19th of April, provide the  
23 government with a week in order to review that. If they do have an  
24 objection, have them lodge their objection by the 26th of April; and if they  
25 do, in fact, file an objection, we'll file a response by the 3rd of May.

1 MJ: the 3rd of May or the 1st of May?

2 CDC[MR. COOMBS]: I was giving myself two more days. The first of May,  
3 ma'am.

4 MJ: Do you need those two more days?

5 CDC[MR. COOMBS]: I don't think so.

6 MJ: All right. You know where to find me if you do.

7 CDC[MR. COOMBS]: Yes, ma'am.

8 MJ: All right. So the 19th of April then would be the  
9 interrogatories, the 26th would be the objections and the 1st of May would  
10 be the reply. I've asked the government to build an updated trial calendar.  
11 Our current trial calendar doesn't contain the session we just set this time  
12 for 7 and 8 May as well as those additional suspense dates that we've placed  
13 in here based upon my order and based upon what Mr. Coombs just said. What  
14 we're going to do with that is the government will draft that, send it to  
15 the parties and myself via e-mail and we'll put that calendar on the record  
16 at the next session.

17 Now, the government -- I've also asked the government for two  
18 draft closure orders: one for John Doe and one for the three classified  
19 witnesses. The government has provided me with the draft orders. I intend  
20 to take those orders, go back and look at all the exhibits and then come  
21 back with my decisions with respect to closure for those four witnesses.

22 I think as we already placed on the record, until we do that dry  
23 run on the 7th and the 8th, and I get the additional evidence that I need  
24 from the government to make any findings for closure, any findings from the

1 Court with respect to the other 24 witnesses will not be made until after  
2 that 7 and 8 May session.

3 Is there anything else that we need to address before we, I guess  
4 we recess the Court for this entire session?

5 CDC[MR. COOMBS]: Nothing from the defense, Your Honor

6 TC[MAJ FEIN]: No, ma'am.

7 MJ: All right. Court is in recess then until the 7th of May at 0930,  
8 once again?

9 TC MAJ FEIN: Ma'am, I'm sorry, right before we actually go on  
10 recess, the intent is we start with a closed session on 7 May or an open  
11 session?

12 MJ: That's actually a good point. The 7 and 8 May session is going  
13 to be right now -- the only thing we really have scheduled substantively is  
14 that closed session for the witness and if there are issues with respect to  
15 the interrogatory, what we will do is we will address them first on the 7th  
16 when we initially open up. If there is anything else that arises between  
17 now and then that we need to actually address, we will go ahead and go on  
18 the record in an open session. Based on what we currently have at issue, I  
19 don't anticipate that open session is going to be very long. We shall see.

20 TC[MAJ FEIN]: So ma'am, just for clarification for all parties,  
21 including potential spectators and the press, we will have an open session,  
22 but we, as of now, expect it to be a very, very short open session and then  
23 move directly into a closed session?

24 MJ: If there are no issues with respect to the interrogatory, the  
25 open session will be to the extent of, "Hello, the Court is now in session,

1 present are everybody. Do we have any issues to address?" If the answer is  
2 "no," we'll go immediately into closed session. That's what I mean, it may  
3 be very, very short. If there are objections to the interrogatories, that  
4 will certainly be coming on, so it may be longer than that. I don't think  
5 at this point I can put out anything more definitive than that. Perhaps  
6 after the interrogatories have been drafted and the government decides  
7 whether you have any kind of an objection to that, maybe there is something  
8 that could be put out the spectators and the media ----

9 TC[MAJ FEIN]: Yes, ma'am. What the government was going ----

10 MJ: ---- that the open session will be longer ----

11 TC[MAJ FEIN]: ---- to propose is that if during that period of time,  
12 if -- if the parties agree with the concurrence that it looks like the open  
13 session will be this very short period of just administrative accounting and  
14 moving right in, that a public affairs announcement be made so the public  
15 would know that essentially it's going to be -- most majority a closed  
16 session.

17 MJ: Defense, do you have any objection to that?

18 CDC[MR. COOMBS]: No objection, Your Honor.

19 MJ: No, I think that's an excellent idea.

20 TC[MAJ FEIN]: Yes, ma'am.

21 MJ: All right. Court is in recess.

22 [The Article 39(a) session recessed at 1556, 10 April 2013.]

23 [END OF PAGE]

1 **[The Article 39(a) session was called to order at 1552, 7 May 2013.]**

2 MJ: This Article 39(a) session is called to order. Trial  
3 Counsel, please account for the parties.

4 TC[MAJ FEIN]: Your Honor, all parties, when the court last  
5 recessed, are again present with the following exception: Mr.  
6 Robertshaw, court reporter, is absent. Mr. Chavez, court reporter,  
7 who has been previously sworn, is present.

8 MJ: All right, as we discussed last session, we inserted  
9 today's session and tomorrow's session into the case calendar.  
10 Today, so we can have an open session and go over everything that has  
11 transpired since the last session we held an then tomorrow--followed  
12 by a closed session tomorrow to go over a--I just heard an echo.  
13 What was that?

14 TC[MAJ FEIN]: Ma'am, the United States will find out and notify  
15 the court.

16 MJ: Is there any reason we need to stop the proceedings?

17 TC[MAJ FEIN]: Ma'am, if we could have 30-second, in-place  
18 recess?

19 MJ: All right. Court is in recess in place.

20 **[The Article 39(a) session recessed in place at 1553, 7 May 2013.]**

21 **[The Article 39(a) session was called to order at 1554, 7 May 2013.]**

22 MJ: Court is called to order. Let the record reflect all  
23 parties present when the court last recessed are again present in

1 court. I was advised by the court reporter that it was an automation  
2 glitch from the court reporting equipment, so we're all ready to  
3 proceed.

4 As I stated earlier, this session was inserted, today, for  
5 the purposes of the open session and then tomorrow for the closed  
6 session to go over the testimony of a particular witness who--as sort  
7 of a dry-run test to see whether we have alternatives to closure to  
8 protect classified information in this case.

9 On 30 April 2013, the government had sent me a press  
10 release that was intended to be released to the public regarding the  
11 proceedings today and tomorrow. I made them take out a sentence that  
12 they were proposing to put in there. Other than that, the Court said  
13 the press release was fine.

14 Does either side have any objection or any other issue with  
15 the press release?

16 CDC[MR.COOMBS]: No, Your Honor.

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: All right. Major Fein, would you like to put on the record  
19 what appellate exhibits have been added since the last session?

20 TC[MAJ FEIN]: Yes, ma'am. Ma'am, on the 14th of April 2013,  
21 the defense filed an--interrogatories for Mr. John Doe that's been  
22 marked as Appellate Exhibit 526 and that includes the defense email

1 and government email chain that ended on the 17th of April 2013, as  
2 appended to that Appellate Exhibit 526.

3 On the 15th of April 2013, the Court issued her order for  
4 the case calendar that was--has been marked as Appellate Exhibit 519,  
5 and, subsequently, the corrected copy, dated 17 April 2013 which has  
6 replaced that appellate exhibit as Appellate Exhibit 519.

7 On the 17th of April 2013, the government requested leave  
8 of the court to file alternatives--excuse me, to file alternative--  
9 the alternatives to disclosing--or alternatives to closure for  
10 classified information during court. And on the 17th of April 2013,  
11 the Court made her ruling. The government's filing was Appellate  
12 Exhibit 520 and the Court's ruling was Appellate Exhibit 521.

13 MJ: And for the record, the Court granted it.

14 TC[MAJ FEIN]: And, ma'am, based off of that, yesterday--to skip  
15 ahead--on the 6th of May 2013, the government filed its proposed  
16 alternatives to classified information and that has been marked as  
17 Appellate Exhibit 530.

18 On 19th April 2013, the government notified the defense and  
19 the Court that it intended to call Ambassador Yamamoto, the Acting  
20 Assistant Secretary and Principle Deputy Assistant Secretary for  
21 African Affairs for the Department of State, as the witness for the  
22 dry-run session, tomorrow, during the closed hearing.



1           On the 22nd of April 2013, the government provided notice  
2 to the Court, in reference to the defense's M.R.E. 505 notice that's  
3 been marked as Appellate Exhibit 522.

4           On the 22nd of April 2013, the government filed notice with  
5 the Court to give an update on the security clearances for the three  
6 witnesses the defense has requested access the classified  
7 information, based off them being civilians and that's been marked as  
8 Appellate Exhibit 523.

9           On the 23rd of April 2013, the defense requested leave of  
10 the court for filing its *Grunden* filing. That has been marked as  
11 Appellate Exhibit 524. Excuse me, Your Honor. Your Honor, on the  
12 24th of April 2013, the defense also notice of its intent to use  
13 classified information for proposed court closure. That's been  
14 marked as Appellate Exhibit 525. That was delivered to the  
15 prosecution and sent--the prosecution sent, via SIPRNET, to the  
16 Court.

17           On the 29th of April 2013, the government responded to the  
18 defense interrogatory questions for Mr. John Doe via SIPRNET and the  
19 original file was marked--or has been marked as Appellate Exhibit  
20 528. Also, on the same day, the government filed an unclassified,  
21 redacted version and that has been filed--or, excuse me, marked as  
22 Appellate Exhibit 527.

1           On the 1st of May 2013, the government requested leave of  
2 the court to provide its plan to execute immediate transcription of  
3 closed sessions for public release and that request has been marked  
4 as Appellate Exhibit 529.

5           MJ: What was the date of that, again?

6           TC[MAJ FEIN]: Your Honor, the 1st of May 2013.

7           MJ: All right. And, for the record, the defense request for a  
8 2-day delay to file their *Grunden* matters was not objected to by the  
9 government. The Court approved that delay.

10           The 1 May request by the government to--for leave of the  
11 court to have until 20 May 2013 to file their plan for transcripts  
12 and classification reviews for closed sessions, also, was not  
13 objected to by the defense and the Court granted that motion as well.

14           I held an R.C.M. 802 conference with counsel before we  
15 began today. What that is is a conference where I discuss logistics  
16 and scheduling and sort of the order of march for the issues that  
17 we'll be addressing today. And, in the R.C.M. 802 conference, I did  
18 have a question for the defense. I had understood, earlier, during  
19 the Article 39(a) session in April when we were discussing the  
20 closure for the witness, John Doe, as well as three classified  
21 witnesses--the defense advised me that they didn't object to closure  
22 for those four witnesses and I was confused by the defense *Grunden*  
23 filing as to whether that may be the case with one of them.

1           Would the defense clarify their position, please?

2           ADC[MAJ HURLEY]: Absolutely, ma'am. We apologize for the  
3 confusion. We maintain our position as it was stated to you earlier  
4 that, with respect to those four witnesses, we do not object to court  
5 closure. I anticipate filing that corrected copy of our *Grunden*  
6 filing towards the end of this week, ma'am, or over the weekend.  
7 And, in that filing, we'll clear up the confusion for the Court.

8           MJ: All right. And in that 802, the Court, also, had asked the  
9 defense whether they had filed a--that was a classified filing from  
10 the defense--as to whether the defense had filed a redacted version  
11 of that filing and the defense had not and I would ask that the  
12 parties get together and make sure that there is a redacted filing of  
13 that *Grunden* filing as well.

14          ADC[MAJ HURLEY]: Yes, ma'am.

15          TC[MAJ FEIN]: Yes, ma'am.

16          MJ: All right. I am prepared to rule on the order to close  
17 proceedings with respect to Mr. Doe, but, before I get there, does  
18 either side want to address any issues, now, on the record?

19          TC[MAJ FEIN]: Ma'am, may we have a moment?

20          MJ: Yes.

21          CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

22          MJ: All right.

1 TC[MAJ FEIN]: Ma'am, the only thing the United States would  
2 recommend is a possible summary of the 802 conference this morning--  
3 or this afternoon.

4 MJ: Summary of the----

5 TC[MAJ FEIN]: Of the 802 conference that had occurred right  
6 before this session.

7 MJ: That we just did?

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: All right. Well, most of that was what we just went over--  
10 --

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: ----was the housekeeping. We also discussed the potential-  
13 -there may be some grants of immunity coming. Those are in the  
14 works, is that correct?

15 TC[MAJ FEIN]: Yes, ma'am, they are.

16 MJ: All right. And, at this point, does either side wish the  
17 Court to go into any greater specificity until we have some  
18 specificity on what happens with those?

19 TC[MAJ FEIN]: No, ma'am.

20 MJ: Okay.

21 CDC[MR.COOMBS]: No, Your Honor.

1 MJ: All right. There was additional discussing of,  
2 potentially, looking at certain reports and trying to track down  
3 certain witnesses.

4 Does the--do the parties desire the Court to go over that  
5 on the record?

6 TC[MAJ FEIN]: No, ma'am, the reports that the parties are  
7 working for a potential stipulation for the three different reports  
8 and any witness issues the government--because it's the government's  
9 responsibility to ensure all the witnesses attend--participate in the  
10 court-martial. We'll notify the Court and the defense if there are  
11 any continuing issues.

12 MJ: Okay. Any security clearance issues the parties wish to  
13 put on--put forth on the record?

14 CDC[MR.COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: No, Your Honor.

16 MJ: Okay. All right, as I said, the Court is prepared to rule  
17 on the order--and order closed proceedings with respect to the  
18 witness, John Doe.

19 1. The government moves the Court to order trial  
20 proceedings closed to the public when certain classified information  
21 is being introduced or is the subject of examination or argument to  
22 ensure that the information specified in the government's motion is  
23 not disclosed to the public. Appellate Exhibit 479. On 1 March

1 2013, the Court required the government to resubmit its request with  
2 more specificity. Appellate Exhibit 503. On 15 March 2013, the  
3 government resubmitted its request with more specificity. Appellate  
4 Exhibit 505. Regarding the witness, John Doe, the government offers  
5 the threat to his safety as an additional overriding interest to  
6 close the proceedings during his testimony. Appellate Exhibit 477.

7           2. This ruling sets for the Court's findings with respect  
8 to the portion that the government motion to close the proceedings  
9 for the entire testimony of John Doe. The defense does not object to  
10 the government's motion to close the proceedings for the entire  
11 testimony of John Doe.

12           Findings of fact:

13           1. The government intends to introduce classified evidence  
14 from the testimony of John Doe. No evidence has been presented that  
15 the classified information at issue is in the public domain or has  
16 been officially acknowledged by the government.

17           2. The government presented evidence demonstrating that  
18 John Doe's identity is classified and that the classified information  
19 at issue is national security information requiring protection from  
20 public disclosure. Enclosures 1, 4, 5, 6, 7, and 8 to Appellate  
21 Exhibit 477. The government also presented evidence in Appellate  
22 Exhibit 477 and its enclosures that public disclosure of the identity

1 of John Doe poses a legitimate threat to his safety. The Court  
2 reviewed Appellate Exhibit 477 and its enclosures *in camera*.

3 3. The government proffers that this classified  
4 information is relevant to The Specification of Charge I and  
5 Specification 1 of Charge II.

6 4. The Court finds that the evidence in Appellate Exhibit  
7 477 and its enclosures demonstrates that the government has proved,  
8 by a preponderance of the evidence, that the testimony sought to be  
9 introduced is classified and was properly classified by an authorized  
10 original classification authority applying the standards of Executive  
11 Order 13526.

12 5. Public disclosure of the classified information,  
13 reasonably, could be expected to cause serious harm to the national  
14 security of the United States as described in the classification  
15 reviews. The classified information at issue pertains to military  
16 plans and operations, intelligence activities, intelligence sources  
17 and methods, and the foreign relations and foreign activities of the  
18 United States, the unauthorized disclosure of which reasonably could  
19 be expected to harm the United--harm the national defense and foreign  
20 relations of the United States. Enclosures 1, 4, 5, 6, 7, and 8 to  
21 Appellat Exhibit 477.

22 The law:

1           1. The Court's 13 April 2013 ruling and order, *Interplay*  
2 between M.R.E. 505 and R.C.M. 806 and *U.S. v. Grunden*, Specificity of  
3 Classified Information and John Doe, sets forth the Court's view of  
4 the law regarding closure of trial proceedings under the First and  
5 Sixth Amendments, R.C.M. 806(b)(2), and M.R.E. 505(j)(5).

6           When the government seeks closure of court proceedings, the  
7 constitutional test incorporated by R.C.M. 806(b)(2) requires the  
8 government to demonstrate that, one, there is a substantial  
9 probability that an overriding interest will be prejudiced if the  
10 proceedings remain open, two, closure is no broader than necessary to  
11 protect the overriding interest, and, three, reasonable alternatives  
12 to closure were considered and found inadequate. The evidence  
13 presented must be sufficient to allow the Court to make case-specific  
14 findings, on the record, justifying closure.

15           3. Where the basis for a proposed closure of portions of  
16 the trial is to protect against disclosure of classified information,  
17 the government must demonstrate that the information is properly  
18 classified, that closure of the proceedings during the presentation  
19 of the classified information is necessary to protect the national  
20 security of the United States, and the proposed closing is narrowly  
21 tailored so the proceedings are closed to the absolute minimum  
22 necessary to protect the national security information. *United*  
23 *States v. Grunden*, 2 MJ 116, Court of Military Appeals, 1977.



1           4. When closing proceedings to protect the national  
2 security of the United States by preventing the disclosure of  
3 classified information, the government must make--or the Court must  
4 make individualized findings with respect to the specific information  
5 the government asserts requires protection from public disclosure.  
6 Identify each witness who will testify regarding the classified  
7 information and close the court only during the portions of the  
8 presentation of evidence that is--that actually divulges the  
9 classified information. *Unite States v. Lonetree*, 31 MJ 849, at 853,  
10 Navy-Marine Court of Military Review, 1990, affirmed and remanded, 35  
11 MJ 396, Court of Military Appeals, 1992.

12           5. The Court of Appeals for the Armed Forces, CAAF, has  
13 recognized the protection of--that protection of classified  
14 information can be an overriding interest that will be prejudiced if  
15 the proceedings remain open. CAAF has also recognized that witness  
16 safety can also be an overriding interest that can be prejudiced if  
17 the proceedings remain open. *United States v. Lonetree*, 31 MJ 849,  
18 Navy-Marine Court of Military Review, 1990, affirmed and remanded, 35  
19 MJ 396, Court of Appeals for the Armed Forces, 1992 and *United States*  
20 *v. Grunden*, 2 MJ 116, Court of Military Appeals--I'm sorry, Court of  
21 Military Review, 1977.

22           Case-specific findings regarding closure:

1           1. Overriding interests. The testimony sought to be  
2 introduced by John Doe has been classified at the Secret level and  
3 was properly classified by an authorized original classification  
4 authority applying the standards of Executive Order 13526. The  
5 government has demonstrated there is a reasonable danger that  
6 presentation of classified information before the public will expose  
7 interests relating to the national security of the United States that  
8 should not be divulged. Public disclosure of the classified  
9 information in this case, reasonably, could be expected to cause  
10 serious harm to the national security of the United States as  
11 described in Appellate Exhibit 477 and its enclosures. The  
12 government has met its burden of persuasion that closure of the trial  
13 during the entire testimony of John Doe is necessary to protect the  
14 overriding interest of national security. The government has also  
15 demonstrated that the safety of John Doe is a legitimate risk if his  
16 identity is disclosed. The safety of John Doe is an additional  
17 overriding interest that would be prejudiced if the proceedings  
18 remain open during his testimony.

19           2. Narrowly tailored closure. With this unique witness,  
20 the bifurcation of testimony into unclassified and classified  
21 information is not possible because the entirety of the testimony for  
22 John Doe is classified. Closure is also necessary to ensure the true  
23 identity of John Doe is not revealed to protect John Doe's safety.

1 It is possible that certain unclassified testimony may be elicited  
2 intermixed with the classified information. In order to narrowly  
3 tailor the closure, the Court has ordered the government to present a  
4 plan to expeditiously prepare a transcript and to conduct the  
5 appropriate classification reviews of the transcript of any testimony  
6 presented in closed session, to include that of John Doe.  
7 Unclassified portions of the testimony will be released to the  
8 public.

9           3. Reasonable alternatives to closure. The Court  
10 considered alternatives to receiving classified testimony in open  
11 court, including the use of redactions, the silent witness rule,  
12 projected electronic displays, unclassified summaries or alternatives  
13 of the testimony, and code words and names. The alternatives to  
14 classified testimony are neither reasonable nor adequate for this  
15 witness. The Court has imposed the classification review requirement  
16 as an alternative to total closure.

17           4. The Court has carefully balanced the accused's Sixth  
18 Amendment right to a public trial and the public's First Amendment  
19 right to a public trial against the potential serious damage to the  
20 national security of the United States that would result from public  
21 disclosure of this information in an open session of this court-  
22 martial and the legitimate risk to John Doe's safety if he testified  
23 publicly. The accused has not objected to the closed session.

1           5. The need to protect that national security information  
2 from disclosure and to protect the safety of John Doe outweighs any  
3 danger of a miscarriage of justice that could attend to the taking of  
4 John Doe's testimony in closed sessions of this court-martial.

5           6. In addition to closure to protect the safety of John  
6 Doe, the government may arrange for an alternate location to elicit  
7 the testimony of John Doe. To ensure the identity of John Doe is not  
8 revealed to trial participants, the Court will permit light disguise  
9 to permit no more than each of the following components: colored  
10 contacts, real or false facial hair, a wig, makeup and/or facial  
11 prosthetics. A light disguise shall be narrowly tailored because it  
12 cannot obscure John Doe's emotive expressions and reactions while  
13 testifying. John Doe's demeanor, body language, nervousness, and  
14 facial reactions will be visible to the parties and the Court to  
15 ensure--enable full assessment of John Doe's credibility.

16           Order:

17           1. The court-martial will be closed to the public during  
18 the testimony of John Doe.

19           2. The government may provide for John Doe to testify at  
20 an alternate, undisclosed, secure location and in light disguise to  
21 protect his classified identity and his safety.

22           3. After John Doe has testified, the government will  
23 expeditiously prepare a transcript of the testimony and conduct

1 appropriate classification reviews of the transcript. A redacted  
2 copy containing any unclassified testimony will be released to the  
3 public. The government's plan to accomplish this is due to the court  
4 on 20 May 2013. So ordered, the 7th day of May 2013.

5 Is there anything further with respect to this order?

6 CDC[MR.COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: All right. The Court will add it as the next appellate  
9 exhibit in line.

10 All right, going back to our R.C.M. 802 conference, the  
11 parties have requested that we take a recess in the middle of these  
12 proceedings to confer about certain things that will be addressed on  
13 the record during these proceedings.

14 Is there anything we should address, now, before we take  
15 that recess?

16 ADC[CPT TOOMAN]: Nothing from the defense, Your Honor.

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: All right. How long do you believe is appropriate?

19 CDC[MR.COOMBS]: The defense would suggest, maybe 25 minutes?

20 TC[MAJ FEIN]: We'll go with an even 30, ma'am.

21 MJ: Why don't we be safe, here, and let's--why don't we start  
22 at 1645 or 4:45? Does that work for both sides?

23 CDC[MR.COOMBS]: Yes----

1 TC[MAJ FEIN]: Yes, ma'am.

2 MJ: Or is that too long?

3 CDC[MR.COOMBS]: That's fine, Your Honor.

4 TC[MAJ FEIN]: That works, ma'am.

5 MJ: Okay. All right. Court is in recess until 1645 or 4:45 in  
6 civilian parlance.

7 **[The Article 39(a) session recessed at 1615, 7 May 2013.]**

8 **[The Article 39(a) session was called to order at 1659, 7 May 2013.]**

9 MJ: This Article 39(a) session is called to order. Let the  
10 record reflect all parties present when the court last recessed are  
11 again present in court. The Court is prepared to rule on closure of  
12 proceedings with respect to the three classified witnesses.

13 1. The government moves the Court to order trial  
14 proceedings closed to the public when certain classified information  
15 is being introduced or is the subject of examination or argument to  
16 ensure that information specified in the government's motion is not  
17 disclosed to the public. Appellate Exhibit 479. On 1 March 2013,  
18 the Court required the government to resubmit its request with more  
19 specificity. Appellate Exhibit 503. On 15 March 2013, the  
20 government resubmitted its request with more specificity. Appellate  
21 Exhibit 505.

22 2. This ruling sets forth the Court's findings with  
23 respect to the portion of the government motion to close the

1 proceedings for the entire testimony of the three classified  
2 witnesses identified in Appellate Exhibit 505, witness numbers 3, 11,  
3 and 22. The defense does not object to closing the court for the  
4 testimony of the three classified witnesses.

5 Findings of fact:

6 1. The government intends to introduce classified evidence  
7 from the testimony of three classified witnesses. No evidence has  
8 been presented that the classified information at issue is in the  
9 public domain or has been officially acknowledged by the government.

10 2. The Court reviewed the relevant classification reviews  
11 which cite the reasons for--that this information is classified.  
12 Enclosure 1 to Appellate Exhibit 18.

13 3. The government proffers that it seeks to introduce  
14 classified testimony from the three classified witnesses that is  
15 relevant to the documents that form the basis for Specifications 3  
16 and 15 of Charge II.

17 4. The Court finds that the proffered testimony and  
18 accompanying classification review demonstrate, by a preponderance of  
19 the evidence, that the identity of the witnesses at issue is  
20 classified and that the testimony sought to be introduced was  
21 properly classified by an authorized original classification  
22 authority applying the standards of Executive Order 13526.

5. The public disclosure of the classified information, reasonably, could be expected to cause serious harm to the national security of the United States as described in the classification reviews as it pertains to intelligence activities, intelligence sources and methods, and the foreign relations and foreign activities of the United States, the unauthorized disclosure of which, reasonably, could be expected to harm the national defense and foreign relations of the United States. Enclosure 1 to Appellate Exhibit 18.

The law:

The law is the same as the Court announced for announcing the closure ruling with respect to John Doe, so I will not repeat those paragraphs.

Case-specific findings regarding closure:

1. Overriding interest. The identity of the three classified witnesses and the testimony sought to be introduced by the three classified witnesses has been classified at the Secret level and was properly classified by an authorized original classification authority applying the standards of Executive order 13526. The government has demonstrated that there is a reasonable danger that the presentation of the classified information before the public will expose interests relating to the national security of the United States that should not be divulged. Public disclosure of the



1 classified information in this case, reasonably, could be expected to  
2 cause harm to the national security of the United States as described  
3 in Enclosure 1 to Appellate Exhibit 18. The government demonstrated  
4 that closure of the trial during the entire testimony of the three  
5 classified witnesses is necessary to protect the overriding interest  
6 of national security.

7           2. Narrowly tailored closure. The bifurcation of  
8 testimony into unclassified and classified information is not  
9 possible for the three classified witnesses because their identity is  
10 classified and the entirety of their testimony involves classified  
11 information. Closure is also necessary to ensure the true identities  
12 of the witnesses are not revealed to the public. It is possible that  
13 certain unclassified testimony may be elicited intermixed with the  
14 classified information. In order to narrowly tailor the closure, the  
15 Court has ordered the government to present a plan to expeditiously  
16 prepare a transcript and to conduct appropriate classification  
17 reviews of the transcript of any testimony presented in closed  
18 session, to include that of the three classified witnesses.  
19 Unclassified portions of the testimony will be released to the  
20 public.

21           3. Reasonable alternatives to closure. The Court  
22 considered alternatives to receiving classified testimony including  
23 the use of redactions, the silent witness rule, projected electronic

1 displays, unclassified summaries or alternatives of testimony, and  
2 code words--names. The alternatives to classified testimony are  
3 neither reasonable nor adequate for these witnesses. The Court has  
4 imposed the classification review requirement as an alternative to  
5 total closure.

6           4. The Court has carefully balanced the accused's Sixth  
7 Amendment rights to a public trial and the public's First Amendment  
8 right to a public trial against the potentially serious damage to  
9 national security of the United States that would result from the  
10 public disclosure of this information in open session of the court-  
11 martial. The accused has not objected to closed proceedings for the  
12 three classified witnesses.

13           5. The need to protect national security information from-  
14 -the national security information from disclosure outweighs any  
15 danger of a miscarriage of justice that could arise from the taking  
16 of the testimony from the three classified witnesses in closed  
17 session of this court-martial.

18           Order:

19           1. The court-martial will be closed to the public during  
20 the testimony of the three classified witnesses.

21           2. After each of the classified witnesses has testified,  
22 the government will expeditiously prepare a transcript of the  
23 testimony and conduct appropriate classification reviews of the

1 transcript. A redacted copy containing any unclassified information  
2 will be released to the public. The government's plan to accomplish  
3 this is due to the Court on 20 May 2013. So ordered this 7th day of  
4 May 2013.

5 Does either side have anything further to address with  
6 respect to this issue?

7 CDC[MR.COOMBS]: No, Your Honor.

8 TC[MAJ FEIN]: No, Your Honor.

9 MJ: All right. This ruling will be marked as the next  
10 appellate exhibit in line.

11 All right, Counsel, is there anything else we need to  
12 address in today's open session?

13 CDC[MR.COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: All right. Pursuant to the case calendar, I advised the  
16 public that there had been no changes made to the case calendar with  
17 respect to the remaining Article 39(a) session which is scheduled for  
18 the 21st through the 24th of May of 2013. That will be open to the  
19 public and will begin on the 21st of May 2013 at 0930 like we  
20 normally do?

21 CDC[MR.COOMBS]: Yes, Your Honor.

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: All right. Is there anything else we need to address  
2 before we recess the court?

3 CDC[MR.COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor.

5 MJ: All right. Court is in recess.

6 **[The Article 39(a) session recessed at 1706, 7 May 2013.]**

7 **[END OF PAGE]**

Pages 7120 through 7331 of this transcript are classified “SECRET”. This session (8 May 2013, Session 1) is sealed for Reasons 2 and 3, Military Judge’s Seal Order dated 17 January 2014 and stored in the classified supplement to the Record of Trial.

1 [The court-martial was called to order at 1033, 21 May 2013.]

2 MJ: This Article 39 (a) session is called to order.

3 Major Fein, please account for the parties.

4 TC[MAJ FEIN]: Your Honor, all parties when the court last  
5 recessed are again present the following exceptions: Captain Morrow  
6 is absent, Captain von Elten, for the government, is present. Mr.  
7 Chavez, court reporter, is absent; Mr. Robertshaw, court reporter, is  
8 present and has been previously sworn.

9 MJ: All right, thank you. All right, let's begin today--the  
10 last session the Court held was a closed session on the 8th May of  
11 2013 to determine whether there are reasonable alternatives for  
12 closure for 24 witnesses where closure has been proposed by the  
13 government. At that session, or at the end of that session, the  
14 government had filed a motion asking for certain delays. Major Fein,  
15 would you like to go over that?

16 TC[MAJ FEIN]: Yes, Your Honor. And, Your Honor, if it pleases  
17 the Court, right before that, the close of the open session on the  
18 7th, the government also filed the government proposed alternatives  
19 to classified information and that was marked as Appellate Exhibit  
20 530 to be put on the public record. Your Honor, on 7 May 2013, what  
21 has been marked as Appellate Exhibit 544, the government requested  
22 leave from the Court to provide evidence of the classified nature of  
23 the evidence for the witnesses that the government moved in its

1 Grunden filing that it would have closure for, and those--the request  
2 was until--excuse me, until 10 May in order to provide that  
3 information based off of current events that did not allow certain  
4 OCAs to sign the appropriate documentation.

5 MJ: All right, and the Defense had no objection, is that  
6 correct?

7 CDC[MR. COOMBS]: That is correct, Your Honor.

8 MJ: All right, and the Court granted that motion orally on the  
9 record. Major Fein, have there been other filings?

10 TC[MAJ FEIN]: Yes, ma'am, there have been. Ma'am, on 10 May  
11 2013 the government filed a joint stipulation of expected testimony  
12 from Ms. Ivory which has been marked as Appellate Exhibit 537. On 10  
13 May 2013, the government filed a joint stipulation of expected  
14 testimony, classified stipulation, for Mr. Travieso which has been  
15 marked as Appellate Exhibit 538. And also on the same day, filed a  
16 unclassified and redacted version of the same stipulation of expected  
17 testimony and that has been marked as Appellate Exhibit 539. On 10  
18 May 2013, the government filed a joint stipulation of fact concerning  
19 the Osama bin Laden evidence that was found, and that was filed as  
20 classified via SIPRNET and has been marked as Appellate Exhibit 540.  
21 On the same day, Your Honor, the government filed a joint stipulation  
22 of fact, the same one for Osama bin Laden information in unclassified  
23 and redacted form, and that has been marked as Appellate Exhibit 541.

1 On 10 May 2013, the government filed an accounting notice of  
2 discovery and expert witnesses and then on the 15th of May 2013 the  
3 government filed a corrected copy of the same filing and that has  
4 been marked as Appellate Exhibit 543. On 10 May 2013, the government  
5 filed its evidence of the classified nature of the information for  
6 different witnesses for the closed session and that has been marked  
7 as Appellate Exhibit 542. On 13 May, ma'am, 2013, the defense filed  
8 their *Grunden* filing and propose alternatives via SIPRNET an  
9 unclassified and that was marked as Appellate Exhibit 545. On 13 May  
10 2013, the defense filed an unclassified and redacted version--excuse  
11 me, not on that day, but the defense also filed in unclassified and  
12 redacted version and that has been marked as Appellate Exhibit 546.  
13 On the 14th of May 2013, the government filed a targeted brief on the  
14 expert opinion relevance of expert opinion for the 793 and 1030 and  
15 other offenses and that has been marked as Appellate Exhibit 544. On  
16 the 17th of May 2013, the defense filed a response to the  
17 government's motion--excuse me, the government's targeted brief on  
18 the relevance of expert opinion and that has been marked as Appellate  
19 Exhibit 547. Finally, Your Honor, on the 20th of May 2013, the  
20 government filed its plan for expeditious transcription of closed  
21 session--closed classified sessions in order to have unclassified  
22 redacted transcripts released to the public, and that has been marked  
23 as Appellate Exhibit 548.



1 MJ: Is there a corrected copy of the defense filing under  
2 505(h)?

3 ADC[MAJ HURLEY]: Yes, ma'am, what was filed on 13 May is the  
4 corrected one.

5 MJ: Okay, thank you. All right, and also for the record, the  
6 government is preparing for the Court proposed a trial plan for trial  
7 proceedings and hours that the trial will be on and off during  
8 periods where there will be no federal employee furloughs and also  
9 for periods where there will be a federal employee furloughs, is that  
10 correct?

11 TC[MAJ FEIN]: That is correct, ma'am, and that is due by close  
12 of business today and also due by close of business today, this was--  
13 came out of the closed session, is the government must present to the  
14 defense and the Court the first 25 witnesses it intends to call,  
15 starting June 3rd.

16 MJ: All right. Counsel and I held an R.C.M. 802 conference  
17 before we came on the record today. Once again, what that is is a  
18 conference where I talk to the parties about scheduling issues and  
19 logistics issues that are probably going to arise in the case. And,  
20 some of the things that came up were what Major Fein just discussed.  
21 The government is going to provide the defense and the Court notice  
22 in waves, if you will, of approximately 25 witnesses on a rolling  
23 basis of the 25 witnesses that will be called and coming in and then

1 the next rolling basis of 25 witnesses that will be called and coming  
2 in, so everyone is on the same page with who is going to be  
3 testifying and when that was going to be.

4 Mr. Coombs, do you have anything further with respect to  
5 that?

6 CDC[MR. COOMBS]: No, Your Honor.

7 MJ: And, the Court also went over with the parties just some  
8 issues of things that might be declassified, some reporting things,  
9 just the status of various witnesses. There are certain--that are  
10 involved with any number of witnesses and documents we have in this  
11 case, there is always something juggling up in the air. But, some  
12 things are moving in play, does either side desire to set forth for  
13 the record with any further specificity?

14 TC[MAJ FEIN]: Your Honor, one document has been declassified,  
15 or at least portions of the document, and that document--that serves  
16 as one of the charged documents for a specification and provided the  
17 Court and the defense is the Army Counterintelligence Center report.

18 MJ: All right. Mister Coombs?

19 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

20 MJ: And, I believe the government also advised me during the  
21 R.C.M. 802 conference that there was one specification that the  
22 government--of Charge II, that the government was not going to go  
23 forward with the greater offense.

1 TC[MAJ FEIN]: Yes, ma'am. Your Honor, based off PFC Manning's  
2 guilty plea for Specification 14 of Charge II, the United States does  
3 not intend to go to move forward on the greater offense for the  
4 single cable that makes up Specification 14 of Charge II.

5 MJ: All right.

6 Mr. Coombs, the government has filed, and you have a copy  
7 of, their accounting for the discovery and experts, do you have any  
8 issues with respect to that?

9 CDC[MR. COOMBS]: No, Your Honor.

10 MJ: One additional thing that was discussed by the parties and  
11 me is that on 15 May of 2013 President Barack Obama signed an  
12 executive order that amended the military rules of evidence and these  
13 amendments have some substantive changes to Military Rule of Evidence  
14 505 which governs classified information. Now, in the Executive  
15 Order itself in section 2(b), the executive order says, "Nothing in  
16 these amendments shall be construed to invalidate any nonjudicial  
17 punishment proceedings, restraint, investigation, referral of  
18 charges, trial in which arraignment occurred, or any other action  
19 begun prior to the effective date of this order. And, any such  
20 nonjudicial punishment, restraint, investigation, referral of  
21 charges, trial, or other action may proceed in the same manner and  
22 with the same effect as if these amendments had not been prescribed."

1           When the Court discussed this with the parties, the Court  
2 reads this section to state that since arraignment has already  
3 occurred in these proceedings, what has been done thus far in  
4 accordance with the old Military Rule of Evidence 505 in effect at  
5 the time the actions were taken, nothing in the new amendments would  
6 go to invalidate any of those actions.

7           Is that the understanding of the parties as well?

8           CDC[MR. COOMBS]: Yes, Your Honor.

9           TC[MAJ FEIN]: Yes, Your Honor.

10          MJ: All right, now going forward we may be facing some issues  
11 where the new Military Rule of Evidence 505 differs from the old  
12 Military Rule of Evidence 505. I do want to address one piece of  
13 that now.

14          Major Fein, what is the Appellate Exhibit number for the  
15 plan for the government to store certain classified Appellate  
16 Exhibits away from the record of trial?

17          TC[MAJ FEIN]: May I have a moment, Your Honor?

18          MJ: Absolutely.

19          TC[MAJ FEIN]: Your Honor, Appellate Exhibit 486, the  
20 prosecution's proposed plan for storage of Appellate Exhibits not  
21 accompanying the record of trial, dated 8 February 2013; AE 486.

22          MJ: All right, for the record, one of the changes in the  
23 Military Rule of Evidence is M.R.E 505(m), for records of trial. If,

1 under this rule, and the information is withheld from the accused,  
2 the accused objects to such withholding in the trial--excuse me, I am  
3 looking--

4 DC: I believe it is 505(1), ma'am.

5 MJ: I am sorry, 505(1). It is 505(1)(2)--states that  
6 government information kept under seal, "The military judge must  
7 allow government information offered or accepted into evidence to  
8 remain under seal during the trial even if such evidence is disclosed  
9 in the court-martial proceeding and may, upon motion of the  
10 prosecution, seal exhibits containing government information in  
11 accordance Rule for Court-Martial 1103(a)," that is the Rule for  
12 Court-Martial governing sealing, "for any period after trial as  
13 necessary to prevent the disclosure of government information when a  
14 knowledgeable United States official, described in subdivision d.,  
15 submits to the Military Judge a declaration setting forth the  
16 detriment to the public interest the disclosure of such information  
17 reasonably could be expected to cause." Now, the new rules  
18 anticipate that anything kept under seal will accompany the record of  
19 trial. Now, in the Court's view, the plan that the government, at  
20 the order of the court, came up with to ensure that classified  
21 information that is not actually physically going with the record of  
22 trial is kept in a secure location suitable for classified  
23 information under provisions where there is a custodian, there is

1 checks to make sure that information is there, and is available for  
2 appellate review should that actually become necessary. In the  
3 Court's view, that plan, although the classified information is not  
4 physically accompanying the record trial, it still falls within the  
5 parameters of the rule because the goal of the rule is to ensure that  
6 the information is kept, it is maintained, it is--the record  
7 indicates where it is and appellate authorities can review it.

8 Do both sides agree?

9 CDC[MR. COOMBS]: Yes, Your Honor.

10 TC[MAJ FEIN]: Yes, Your Honor. And just to note, Your Honor,  
11 because of the classification level of that information, the Court of  
12 Appeals for the Armed Forces--the Army Court of Criminal Appeals, do  
13 not have have organic facilities to store that information which is  
14 why it is accompanied by reference.

15 MJ: Does either side wish to address anything further with  
16 respect to the new military rule of evidence 505?

17 CDC[MR. COOMBS]: No, Your Honor.

18 TC[MAJ FEIN]: No, Your Honor.

19 MJ: All right, the Court just received this morning the  
20 government's proposed transcription and classification review plan  
21 for closed sessions with the end goal that there would be--after the  
22 classification review, any unclassified information that is held in  
23 the closed sessions will be disclosed to the public expeditiously.

1 Since I just got it, I have not had a chance to review it, so unless  
2 either side objects at this point, I do not think we need to discuss  
3 this any further on the record until we have all had a chance to  
4 digest it.

5 CDC[MR. COOMBS]: No objection, Your Honor.

6 TC[MAJ FEIN]: No objection, Your Honor.

7 MJ: Now with respect to the relevance issue, the closed session  
8 that we held on 8 May of 2013, the government's dry run witness  
9 testified to a variety of things and at--after the testimony, the  
10 Court ordered the government to brief the Court on [one] the  
11 relevance of the testimony on context and circumstances surrounding  
12 the charged information; two, the relevance of testimony on  
13 prospective damage that could be caused to the United States by the  
14 release of the charged classified evidence on the date of release;  
15 and three, whether the defense may rebut such testimony. The court  
16 also asked the defense to respond to the government's filing. I have  
17 both of those briefs. They have both been marked as appellate  
18 exhibits; Appellate Exhibit 544 for the government and Appellate  
19 Exhibit 547 for the defense.

20 Does either side desire oral argument on the issue?

21 TC[CPT von ELTEN]: No, Your Honor.

22 ADC[MAJ HURLEY]: No, Your Honor.

1 MJ: The Court will be prepared to rule then on that issue a  
2 little bit later today. The government also submitted a proposed  
3 case calendar to which the defense did not have an objection. The  
4 Court has not marked it as Appellate Exhibit because during a recess  
5 today I just want to go over it one last time with the parties to  
6 ensure that have been no changes or anything else I need to add  
7 rather than cluttering the appellate exhibits with yet another case  
8 calendar when we can use the draft and if there is any changes we  
9 will go ahead and make them and we will just add that today.

10 Does either side object to that?

11 TC[MAJ FEIN]: No, Your Honor.

12 CDC[MR. COOMBS]: No, Your Honor.

13 MJ: Does either side see any further issues--well, I know  
14 Defense, I believe you are going to get this in writing, but you had  
15 certain changes to your witness list.

16 CDC[MR. COOMBS]: That is correct, Your Honor. And, I will  
17 reduce that to writing that I will serve on the Court and the  
18 government.

19 MJ: Okay, thank you. PFC Manning, we have certain stipulations  
20 that have been agreed to by the parties and yourself. I need to go  
21 over those stipulations with you. I believe that at least two of  
22 them are classified, is that correct?



1 TC[MAJ FEIN]: Yes, Your Honor, if we could have, before you  
2 begin, a 10 minute recess, we will get everything situated and ready  
3 for that process.

4 MJ: We will do that. What we will do, PFC Manning, the last  
5 time we went over classified information; I would like to do that  
6 again in open court. I do not see any reason we need to close the  
7 Court. I am not going to actually go over what is in the stipulation  
8 although you are going to have it in front of you. So, we will have  
9 you sitting over in the members' box like we did before.

10 ACC: Yes, Your Honor.

11 MJ: Is there anything else we need to address before we take  
12 the recess to set the Court up for PFC Manning's and my discussion on  
13 the stipulations?

14 TC[MAJ FEIN]: Just one, Your Honor. During the 802, the  
15 defense brought up the topic of VTCs and teleconference for  
16 witnesses. And, if we could just put that on the record, please,  
17 what the defense is offering.

18 MJ: Mr. Coombs?

19 CDC[MR. COOMBS]: Yes, ma'am. Your Honor, the defense has  
20 offered to the government, if they identify OCONUS witnesses,  
21 witnesses that are outside of continental United States, that they  
22 would like to testify either by VTC or telephonic, we would not

1 object to their testimony, once we have the identity of which  
2 witnesses they would like to do that with.

3 MJ: Okay. PFC Manning, you heard what Mr. Coombs just said,  
4 has he had a discussion with you with respect to this issue?

5 ACC: Yes, Your Honor.

6 MJ: Has he talked to you about your Sixth Amendment right to  
7 confront witnesses?

8 ACC: Yes, ma'am.

9 MJ: And, has he told you that that Sixth Amendment right to  
10 confront witnesses means that you have the right to demand that they  
11 personally--that they are actually here sitting in this chair where  
12 you can look at them?

13 ACC: Yes, Your Honor.

14 MJ: Okay. And you can observe their demeanor and so can the  
15 fact finder, which in this case is me?

16 ACC: Yes, Your Honor.

17 ACC: All right, now understanding your rights, your Sixth  
18 Amendment right to confrontation, what Mr. Coombs is essentially  
19 saying is that you are willing to waive that right and have this  
20 testimony by OCONUS witnesses done by VTC or telephone which, if you  
21 had objected, may not meet the Sixth Amendment confrontation rights--  
22 or, does not meet the Sixth Amendment confrontation rights. Do you  
23 understand that?

1 ACC: Yes, Your Honor.

2 MJ: Okay now, are you in accord with Mr. Coombs; are you  
3 willing to waive your right to--your Sixth Amendment right to  
4 confront these witnesses?

5 ACC: For some witnesses, yes, Your Honor.

6 MJ: So Mr. Coombs, I believe, said all OCONUS witnesses.

7 CDC[MR. COOMBS]: Once we get the list of witnesses, I believe  
8 it is going to be all of the OCONUS witnesses that I know that the  
9 government does not want to have in person. So, once we get the list  
10 from the witnesses that the government would like, because some of  
11 the witnesses I believe the government would want to have physically  
12 present anyways because of the need to show documents to or the need  
13 to admit certain items through. So, once we get their list of  
14 witnesses that they would like to do this with, I imagine is going to  
15 be all of those witnesses. If there are any of them that we would  
16 not agree to, then we would do that for the government in a timely  
17 basis so that they can still present the witness.

18 MJ: So, PFC Manning, this discussion we are having may be  
19 premature. You cannot waive something that you do not know exists.  
20 So, what we will both do is, when we find out who the witnesses are,  
21 you and I will have this discussion.

22 ACC: Yes, ma'am, thank you.

23 MJ: Anything else?

1 TC[MAJ FEIN]: And ma'am, just to place on the record the last  
2 part, I think at the end of the 802, which was the damage assessment  
3 discussion, the parties have met and reviewed the two damage  
4 assessments; this is the NCIX damage assessment and the DIA,  
5 Department of Defense damage assessments. They are two damage  
6 assessments. The parties have met and tentatively agreed on a  
7 summarized version that would be used in court and that would be  
8 accessible to Private First Class Manning if the defense moves to use  
9 the damage assessments during his sentencing, presentencing, phase.  
10 Currently the government is still working for the final summary to be  
11 remarked for classification. Once that occurs, the government  
12 intends to have that marked as Appellate Exhibit, ready for the  
13 parties to use, if they so desire. And so, the parties have met and  
14 agreed tentatively on that summary--the two summaries, excuse me.

15 MJ: Anything further with respect to that?

16 ADC[MAJ HURLEY]: No, ma'am.

17 MJ: Anything from the Defense that we need to address before we  
18 recess to go over the stipulations with PFC Manning?

19 CDC[MR. COOMBS]: No, ma'am.

20 MJ: All right. How long do you need?

21 TC[MAJ FEIN]: Ma'am, we could restart at 11 o'clock.

22 MJ: All right, court is in recess until 11 o'clock.

23 **[The court-martial recessed at 1055, 21 May 2013.]**

1 [The court-martial was called to order at 1108, 21 May 2013.]

2 MJ: This Article 39(a) session is called to order.

3 Let the record reflect all parties present when the Court  
4 last recessed are again present in court. I note for the record that  
5 PFC Manning, Major Hurley, and Major Fein are sitting in the panel  
6 box.

7 All right, PFC Manning, do you have a copy of Appellate  
8 Exhibit 537, it is a stipulation of expected testimony of Ms. Elisa  
9 Ivory?

10 ACC: Yes, Your Honor.

11 MJ: A copy of Appellate Exhibit 538, which is a stipulation of  
12 expected testimony for Mr. Louis Travieso?

13 ACC: Yes, Your Honor.

14 MJ: And, Appellate Exhibit 540, which is a stipulation of fact  
15 for certain evidence involving Osama bin Laden, UBL?

16 ACC: Yes, Your Honor.

17 MJ: Now, did you sign all three of those stipulations?

18 ACC: Yes, Your Honor.

19 MJ: Okay, that is on page 2 of the Ivory stipulation; page 2 of  
20 the Travieso stipulation; and page 2 of the stipulation of fact. Is  
21 that correct?

22 ACC: Yes, ma'am.

1 MJ: Now, do you understand--did you read all three of the  
2 stipulations thoroughly before you signed them?

3 ACC: Yes, Your Honor.

4 MJ: Do you understand the contents of the stipulations?

5 ACC: Yes, ma'am.

6 MJ: Before signing these stipulations, did your defense team  
7 explain the stipulations to you?

8 ACC: Yes, ma'am.

9 MJ: Do you understand that you have an absolute right to refuse  
10 to stipulate to the contents of any of these three items?

11 ACC: Yes, ma'am.

12 MJ: Now, you should enter--do you understand that you should  
13 enter into stipulations only if you believe it is in your best  
14 interest to do that?

15 ACC: Yes, Your Honor.

16 MJ: Now, I want to ensure that you understand how stipulations  
17 are used. Now, let's look at Appellate Exhibit 540, the stipulation  
18 of the fact involving Osama bin Laden.

19 Do you have that in front of you?

20 ACC: Yes, Your Honor.

21 MJ: Now, when counsel for both sides and you agree to the  
22 stipulation of fact, the parties are bound by the stipulation and

1 stipulated matters are facts and evidence to be considered along with  
2 the other evidence in the case.

3 Do you understand that?

4 ACC: Yes, Your Honor.

5 MJ: Now, in contrast, the stipulations of expected testimony  
6 from Ms. Ivory and Mr. Travieso, what that means is when counsel for  
7 both sides and you agree to the stipulation of expected testimony,  
8 you are agreeing that if these two witnesses were present here in  
9 court and testify under oath, they would testify substantially as set  
10 forth in the stipulations of expected testimony. The stipulation  
11 does not admit the truth of the person's testimony; the stipulation  
12 could be contradicted, attacked or explained in the same way as if  
13 the person is testifying in person.

14 Do you understand that?

15 ACC: Yes, Your Honor.

16 MJ: So, do you understand the difference between a stipulation  
17 of fact and a stipulation of expected testimony?

18 ACC: Yes, I do, ma'am.

19 MJ: The facts, you are bound by them; the stipulation of  
20 expected testimony is just what the person would say?

21 ACC: Correct.

1 MJ: Now knowing what I have told you, and your defense counsel  
2 earlier told you about the stipulations, do you still want to enter  
3 into all three of the stipulations?

4 ACC: Yes, ma'am.

5 MJ: Do counsel concur in the contents of the stipulations?

6 ADC[MAJ HURLEY]: Yes, ma'am.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: All right. Now, why are these Appellate Exhibits?

9 TC[MAJ FEIN]: Ma'am, they have currently been marked as  
10 appellate exhibits just for the purposes of today's inquiry and then  
11 the government would move to re-mark, and not move, but would re-mark  
12 them as PEs and put it on the record.

13 MJ: All right, Mr.--why don't we do that? Let's have the court  
14 reporter take these off of the appellate exhibit list and mark them  
15 as--defense, any objection to having them marked as prosecution  
16 exhibits?

17 CDC[MR. COOMBS]: No, Your Honor.

18 MJ: Let's go ahead and right now have Appellate Exhibit 537,  
19 Appellate Exhibit 538, and Appellate Exhibit 540 marked as  
20 prosecution exhibits. Let's save a little paper.

21 TC[MAJ FEIN]: Ma'am, if we may, during lunch recess, we will do  
22 that. And then, we will put on record how the rest of the numbers  
23 cascading will change.



1 MJ: All right, is this going to cause administrative burden to  
2 the court reporter?

3 TC[MAJ FEIN]: Ma'am, it is going to--it can be--we can do it  
4 and after lunch we will have it reflected.

5 MJ: All right, let us do this; get with the court reporter  
6 during the lunch recess.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: Whatever is best for the court reporter is best for the  
9 Court.

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: We will do it that way.

12 All right, is there any further reason that we need to  
13 address anything further with you all sitting in the panel box or do  
14 you want to return to counsel table?

15 ADC[MAJ HURLEY]: Nothing from the defense, ma'am.

16 TC[MAJ FEIN]: No, ma'am.

17 MJ: Why don't you all go ahead and return.

18 [The parties and the accused returned to their respective tables.]

19 MJ: All right. Before we break for the lunch recess, the Court  
20 has had the benefit of the parties' written filings with respect to  
21 the issue of relevance, on the merits, of testimony explaining the  
22 nature of charged classified documents and potential damage. The

1 parties have not desired any additional oral argument, today, so the  
2 court is prepared to rule on that motion.

3           Following the 8 May 2013 closed Article 39(a) session to  
4 determine whether there are reasonable, adequate, alternatives to  
5 trial closure for the protection of classified information in this  
6 case, the Court ordered the parties to file briefs on the following  
7 issues regarding relevance on the merits:

8           1. The relevance of testimony on context and circumstances  
9 surrounding the charged information.

10           2. The relevance of testimony on prospective damage that  
11 could be caused to the United States by release of the charged  
12 classified evidence on the dates of--date of release and;

13           3. Whether the defense may rebut such testimony.

14           The Court has considered the filings by the parties,  
15 evidence presented, the testimony of the "dry-run" witness,  
16 Ambassador Don Yamamoto, Acting Secretary--Acting Assistant Secretary  
17 for African Affairs, Department of State, the charged offenses, the  
18 proposed instructions of the Court, and oral argument of counsel  
19 that--the counsel did give a brief oral argument in the session on 8  
20 May 2013.

21           The Court finds and rules as follows:

22           Findings of Fact:

1           1. The accused is charged with one specification of aiding  
2 the enemy; one specification of wantonly causing intelligence to be  
3 published; eight specifications of violations of United States Code,  
4 Section 793(e)--18 United States Code, Section 793(e); five  
5 specifications of violations of 18 United States Code, Section 641;  
6 two specifications of violations of 18 United States Code, Section  
7 1030(a)(1); and five specifications of violating a lawful general  
8 regulation, in violation of Articles 104, 134, and 92, Uniform Code  
9 of Military Justice, UCMJ.

10           2. The accused has entered a plea of guilty by exceptions  
11 and substitutions to lesser included offenses for Specifications 2,  
12 3, 5, 7, 9, 10, and 15 of Charge II, all in violation of 18 United  
13 States Code, Section 793(e) for the greater offense.

14           The accused's plea and the Court's taking judicial notice  
15 of the existence of 18 United States Code, Section 793(e) leave the  
16 following elements to be proved by the government beyond a reasonable  
17 doubt for the accused to be found guilty of the greater offense for  
18 these specifications:

19           A. That the charged information relates to the national  
20 defense and;

21           B. That the accused had reason to believe that the  
22 information communicated could be used to the injury of the United  
23 States or to the advantage of any foreign nation.

1           The Court's proposed instructions define information  
2 related to the national defense as follows:

3           The term "national defense" is a broad term which  
4 references the United States military and naval establishments and to  
5 all related activities of national preparedness. To prove that  
6 documents, writings, photographs, videos, or information relate to  
7 the national defense, there are two things the government must prove:

8           1. That the disclosure of the material would be  
9 potentially damaging to the United States or might be useful to an  
10 enemy of the United States and;

11           2. That the material is closely held by the United States  
12 government, in that the relevant government agency has sought to keep  
13 the information from the public, generally, and has not made the  
14 documents, photographs, videos, or computer files available to the  
15 general public. Where the information has been made public by the  
16 United States Government and is found in sources lawfully available  
17 to the general public, it does not relate to the national defense.  
18 Similarly, where sources of information are lawfully available to the  
19 public and the United States Government has made no effort to guard  
20 such information, the information, itself, does not relate to the  
21 national defense.

22           In determining whether material is closely held, you may  
23 consider whether it has been classified by appropriate authorities

1 and whether it remained classified on the date or dates pertinent to  
2 the charge sheet. You may consider whether the information was  
3 classified or not in determining whether the information relates to  
4 the national defense. However, the fact that information is  
5 designated as classified does not, in and of itself, demonstrate that  
6 the information relates to the national defense.

7           The Court's instructions define "reason to believe" as  
8 follows: "reason to believe" means that the accused knew facts from  
9 which he concluded or reasonably should have concluded that the  
10 information could be used for the prohibited purposes. In  
11 considering whether the accused had reason to believe the information  
12 could be used to the injury of the United States or to the advantage  
13 of any foreign country, you may consider the nature of the  
14 information involved. You need not determine that the accused had  
15 reason to believe the information would be used against the United  
16 States, only that it could.

17           5. The accused had entered a plea of guilty by exceptions  
18 and substitutions to lesser included offenses for Specifications 13  
19 and 14 of Charge II, the greater offense, in violation of 18 United  
20 States Code, Section 1030(a)(1). The accused's plea and the Court's  
21 taking judicial notice of the existence of 18 United States Code,  
22 Section 1030(a)(1) leave the following elements to be proved by the

1 government, beyond a reasonable doubt, for the accused to be found  
2 guilty of the greater offense for these specifications:

3 A. That the accused knowingly exceeded authorized access  
4 on a Secret Internet Protocol Router, SIPR, Network.

5 B. That the accused had reason to believe that the  
6 information communicated could be used to the injury of the United  
7 States or the advantage of any foreign--or to the advantage of any  
8 foreign nation.

9 6. The accused has entered pleas of not guilty to all the  
10 remaining charges and specifications, thus the government is required  
11 to prove all of the elements of these specifications beyond a  
12 reasonable doubt.

13 The government proffers the evidence of the context and  
14 circumstances surrounding the charged offenses and evidence of  
15 prospective damage are relevant to prove the following elements of  
16 the following offenses:

17 A. The elements of "relating to the national defense" and  
18 "with reason to believe such information could be used to the injury  
19 of the United States or the advantage of any foreign nation" for all  
20 of the 18 United States Code, Section 793(e) specifications.

21 B. The element "with reason to believe such information  
22 could be used to the injury of the United States or the advantage of  
23 any foreign nation," for Specifications 13 and 14, in violation 18

1 United States Code, Section 1030(a), the Court will amend its ruling,  
2 now, because Specification 14--the government is not going forward  
3 with it so there--evidence would not be relevant to that  
4 specification.

5 C. That the information was intelligence, that the  
6 intelligence was true for The Specification of Charge I, Aiding the  
7 Enemy, Article 104, UCMJ and Specification 1 of Charge II, Wantonly  
8 Causing Publication of Intelligence, Clauses 1 and 2 of Article 134.

9 D. The element of value for Specifications 4, 6, 8, 12,  
10 and 16 of Charge II, in violation of 18 United States Code, Section  
11 641 and;

12 E. The element of prejudice to good order and discipline  
13 and service discrediting conduct for the specifications of Charge II  
14 to which the accused has entered a plea of not guilty, and that would  
15 be Specifications 1, 4, 6, 8, 11, 12, and 16 of Charge II.

16 8. The Court's instructions define "intelligence," for The  
17 Specification of Charge I and Specification of Charge II as "any  
18 helpful information given to and received by the enemy which is true,  
19 at least in part."

20 The law:

21 1. Evidence is relevant if, A, it has a tendency to make a  
22 fact more or less probable than it would be without the evidence,

1 and, B, the fact is of consequence in determining the action.

2 Military Rule of Evidence 401.

3 The military judge has the initial responsibility to  
4 determine whether evidence is relevant. *United States v. White*, 69  
5 MJ 236, Court of Appeals for the Armed Forces, 2010.

6 2. Relevant evidence is admissible unless any of the  
7 following provide otherwise:

8 1. The United States Constitution is applied to members of  
9 the armed forces.

10 2. A federal statute applicable to trial by courts-  
11 martial.

12 3. The Military Rules of Evidence or;

13 4. The Manual for Court-Martial.

14 Irrelevant evidence is not admissible. Military Rule of  
15 Evidence 402.

16 3. Relevant evidence may be excluded if its probative  
17 value is substantially outweighed by the danger of one or more of the  
18 following: unfair prejudice, confusing the issues, misleading the  
19 members, undue delay, wasting time, or needlessly presenting  
20 cumulative evidence. Military Rule of Evidence 403.

21 Conclusions of law:



1           1. Evidence of the context and circumstances surrounding  
2 the charged information and prospective damage is relevant to the  
3 following elements:

4           A. Whether the information charged in the specifications  
5 alleging violations of 18 United States Code, Section 793(e) relates  
6 to the national defense, Specifications 2, 3, 5, 7, 9, 10, 11, and 15  
7 of Charge II.

8           B. Whether the information charged in The Specification of  
9 Charge I and Specification of Charge II is intelligence and whether  
10 that intelligence is true, at least in part.

11           2. The government's proffers regarding relevance to the  
12 value element of the specifications alleging violations of 18 United  
13 States Code, Section 641, Specifications 4, 6, 8, 12, and 16 of  
14 Charge II and the element of prejudice to good order and discipline  
15 and service discrediting conduct for all of the specifications of  
16 Charge II to which the accused has pled not guilty provide logical  
17 theories of relevance. The Court will allow limited evidence of the  
18 context and circumstances surrounding the charged offenses and  
19 potential damage to prove those elements.

20           3. The government concedes and the Court agrees that the  
21 defense may also present evidence to challenge the above elements and  
22 to rebut government evidence regarding the context and circumstances  
23 of the charged information with respect to damage.

1           4. Evidence of the context and circumstances surrounding  
2 the charged information of prospective damage that was not known by  
3 the accused is not relevant to whether the accused had reason to  
4 believe the communication of charged information could be used to the  
5 injury of the United States or to the advantage of any foreign nation  
6 for the specifications alleging violations of 18 United States Code,  
7 Section 793(e), Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of  
8 Charge II, or violations of 18 United States Code, Section  
9 1030(a)(1), Specifications 13 and 14 of Charge II. This element is  
10 of *mens rea* of the accused.

11           5. The Court is concerned that extensive evidence of the  
12 context and surrounding circumstances of prospective damage of the  
13 charged information has the potential to cause this trial to devolve  
14 into mini-trials regarding international politics in various regions  
15 of the world, particularly with respect to such evidence regarding  
16 the charged cables of Specifications 12 and 13 of Charge II.

17           A. The evidence is not relevant to any remaining element  
18 of Specification 13 of Charge II.

19           The only remaining elements the government must prove are:

20           1. That the accused knowingly exceeded authorized access  
21 on a SIPR Network and;

1           2. That the accused had reason to believe the information  
2 communicated could be used to the injury of the United States or the  
3 advantage of any foreign nation.

4           B. The evidence is potentially relevant to the value and  
5 prejudice to good order and discipline elements in Specification 12  
6 of Charge II. The government proffer alleges that, for  
7 Specifications 4, 6, 8, 12, and 16 of Charge II, alleging violations  
8 of 18 United States Code, Section 641. The government will prove  
9 value in a thieves market and expects to provide evidence of the  
10 content and context of the charged information and the motives and  
11 resources of foreign adversaries. The government does not proffer  
12 that evidence of the prospective damage to the United States, aside  
13 from evidence of motives and resources of foreign adversaries, is  
14 relevant to value. Accordingly, assuming proper foundation, the--if  
15 the evidence is brief, limited, and focused, evidence of the  
16 immediate context and circumstances surrounding the charged  
17 information in Specifications 12 and 13 of Charge II and the motives  
18 and resources of foreign adversaries for the value element of  
19 Specification 12 of Charge II is relevant. While the Court is not in  
20 a position to rule on any M.R.E. 403 objections to specific evidence  
21 at this time, the parties are on notice that the Court views evidence  
22 beyond that authorized above, as potentially subject to exclusion

1 under Military Rule of Evidence 403, particularly with respect to the  
2 charged cables in Specifications 12 and 13 of Charge II.

3 Ruling:

4 Evidence on the context and circumstances surrounding the  
5 charged information and potential damage is relevant on the merits as  
6 set forth above. The Court will address particular M.R.E. 403  
7 objections as they are raised during the trial.

8 So ordered this 21st day of May 2013.

9 Does either side have anything further to address with this  
10 issue?

11 CDC[MR.COOMBS]: No, Your Honor.

12 ATC[CPT VON ELTEN]: No, Your Honor.

13 MJ: All right. The Court will have this ruling marked as the  
14 next appellate exhibit in line.

15 Is there anything we need to address before we take the  
16 lunch break?

17 TC[MAJ FEIN]: No, Your Honor.

18 CDC[MR.COOMBS]: No, Your Honor.

19 MJ: What time--I know you all have to confer about certain  
20 things. Do you want to make it a long lunch and reconvene, say,  
21 1400ish or go earlier?

22 TC[MAJ FEIN]: Ma'am, I think we can go earlier than that. We  
23 can do 1300, ma'am; that's an--more than an hour and a half.

1 MJ: All right. Is that acceptable to the defense?

2 CDC[MR.COOMBS]: Yes, Your Honor.

3 MJ: All right. Court is in recess until 1300.

4 **[The Article 39(a) session recessed at 1126, 21 May 2013.]**

5 **[The Article 39(a) session was called to order at 1341, 21 May 2013.]**

6 MJ: This Article 39(a) session is called to order. Let the  
7 record reflect all parties present when the court last recessed are  
8 again present in court.

9 All right, before we proceed, the Court has corrected  
10 copies for two orders that I, initially, gave and those are the order  
11 to close proceedings for John Doe and the orders to close  
12 proceedings--order to close proceedings for the three classified  
13 witnesses. The only change made in the corrected copy is to a  
14 paragraph that says--paragraph 1 in the findings of fact. The  
15 original ruling was made on the 7th of May and that would be at  
16 Appellate Exhibit--the order to close proceedings for John Doe was on  
17 the 7th of May, that would be Appellate Exhibit 531. And the order  
18 to close proceedings for three classified witnesses would be on 531  
19 and that was also on the 7th of May; and the same correction is being  
20 made for both of them and it's to paragraph 1 of the findings of  
21 fact. The former findings of fact said, "The government intends to  
22 introduce classified evidence from the testimony of John Doe. No  
23 evidence has been presented that the classified evidence at issue is

1 in the public domain or has been officially acknowledged by the  
2 government." The change is that no evidence as been presented that  
3 the classified information at issue is lawfully in the public domain  
4 or has been officially acknowledged by the government. So, the word,  
5 "lawfully" was added to both of those orders. And we'll put them  
6 just behind the original Appellate Exhibits.

7 Anything further we need to address with that?

8 TC[MAJ FEIN]: No, Your Honor.

9 CDC[MR.COOMBS]: No, Your Honor.

10 MJ: Now, we were going to discuss the defense's 505(h) filing.  
11 I believe the parties had conferred over the recess, is that correct?

12 ADC[MAJ HURLEY]: Yes, ma'am, that's correct.

13 MJ: Okay. And do we have any issues discuss with respect to  
14 it?

15 ADC[MAJ HURLEY]: No, not from the defense, ma'am.

16 MJ: Okay. Anything from the government?

17 TC[MAJ FEIN]: No, ma'am, the defense is going to answer the  
18 government's questions and we can process their filing by the end of  
19 the week.

20 MJ: All right. I have--and one other issue that--again, the  
21 parties and I met in a brief R.C.M. 802 conference before coming on  
22 onto the record, today--and that, again, is where I discuss issues  
23 and things that are going to arise in the case--and the defense

1   advised me the government had proffered, earlier, that the government  
2   was going to use the providence inquiry from PFC Manning to  
3   authenticate the charged documents and move to admit those.

4           Is that still the government's plan?

5           TC[MAJ FEIN]: Yes, ma'am. In order to mark the documents and  
6   have them in some type of order for the trier of fact, the government  
7   argues--or does argue that, under R.C.M.--excuse me, M.R.E. 901, the  
8   documents are authentic based off of the providence inquiry and they  
9   are relevant, not based off the providence inquiry, but based off  
10  being the actual, substantive charged documents that make up the  
11  various 1030 and 793 specifications.

12          MJ: All right.

13          TC[MAJ FEIN]: Now, to be--and, Your Honor, that would not  
14  include Specifications 11 and 16 because Private First Class Manning  
15  didn't plead guilty to those, so those charged documents are not  
16  included. And that's from Appellate Exhibit 501 which is all of the  
17  classified documents.

18          MJ: All right. Defense, what's your position?

19          CDC[MR.COOMBS]: Your Honor, we would object under M.R.E.--or,  
20  excuse me, R.C.M.--excuse me, M.R.E. 901. The government has not  
21  established that the authentication; they haven't laid the proper  
22  foundation for admissibility of the items, so we would object to

1 using the providence inquiry for the government to lay it out on  
2 authentication.

3 MJ: Does either side have any authority for--I understand the  
4 Court can't use the providence inquiry--things that PFC Manning says--  
5 -on the merits, but when it actually establishes an element to  
6 proved, does any--does either side have any authority where a  
7 providence inquiry has been used to authenticate documents that are  
8 used by the government to prove the greater offense in a lesser-  
9 greater offense scenario?

10 TC[MAJ FEIN]: Well, Your Honor, the government would contend if  
11 the document is being used to prove, as evidence--well, the answer is  
12 no, Your Honor. The government didn't find a case one way or  
13 another, but that's why the government is very specific just to use  
14 it only for authentication purposes, not for relevance purposes.

15 CDC[MR.COOMBS]: And, Your Honor, the defense's position would  
16 be that this is where the government needs to bring the proper  
17 witness in order to prove up the offenses that they're going forward  
18 on. They should not be allowed to use PFC Manning's providence  
19 inquiry on elements that did not admit to the authentication of the  
20 charged documents.

21 MJ: Well----

22 TC[MAJ FEIN]: Ma'am----



1 MJ: You mean for elements, say, for example--what about the--  
2 I'm looking at the 793(e) and 1030(a)(1) offenses. I mean, I  
3 understand your position with--when they're not in a greater or  
4 lesser capacity. PFC Manning didn't--entered not guilty pleas to all  
5 of those, so there's nothing authenticated by his plea. But, with  
6 respect to the lesser-greater offenses, what's your position?

7 CDC[MR.COOMBS]: Well, with respect to the lesser offense, what  
8 he did was he pled to certain elements within the lesser offenses and  
9 one of those was acknowledging that, you know, these were documents  
10 that he released, but that doesn't carry the day for the government  
11 to admit these into evidence. They still need to present some sort  
12 of witness testimony to establish the authentication for the  
13 documents. So, in this instance, the government, now, is wanting to  
14 admit the charged documents for each of the offenses to which he's  
15 pled to a lesser included offense in order to, apparently, help them  
16 in proving their greater offense. The defense's position is that  
17 they would still need to bring an authentication witness for that  
18 purpose.

19 MJ: Okay. Major Fein, with--taking away the offenses for which  
20 PFC Manning has entered lesser--a plea to a lesser included offense--  
21 for example, the 641 offenses in Specification 11 of Charge II--what  
22 would the government's theory of authenticity be with respect to

1 those offenses where the accused has pled not guilty on the  
2 authentication?

3 TC[MAJ FEIN]: Well, ma'am, if--I guess--just to make sure I  
4 understand your question, once a document is authentic, it is what it  
5 purports to be, then--and it is relevant and admitted, it can be used  
6 for any purpose at that point.

7 MJ: But how do you use something that PFC Manning said in a  
8 plea to Offense A to prove Offense B to which he's---

9 TC[MAJ FEIN]: Well, ma'am, again----

10 MJ: ----pled not guilty?

11 TC[MAJ FEIN]: ----that's why the United States argues it's only  
12 for authentication because, contrary to what the defense is arguing,  
13 the flipside of that is that these documents are not the charged  
14 documents. I mean, Private First Class Manning, during the  
15 providence inquiry, reviewed Appellate Exhibit 501, sat, under oath,  
16 and said, "These are what they purport to be; they are the documents  
17 I compromised," and that's all we're, simply saying, Your Honor--is  
18 that he already did that. We have met the burden under M.R.E. 901.  
19 We have----

20 MJ: But how am I allowed to use what he says in the providence  
21 inquiry?

1 TC[MAJ FEIN]: Your Honor, we're saying it can be used solely  
2 for authentication while the government still has the burden to  
3 establish relevance in order to move to----

4 MJ: And you have no authority for that?

5 TC[MAJ FEIN]: No, we don't; or to the contrary.

6 MJ: Okay. The objection is sustained.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: All right. Before--the Court was prepared to issue the  
9 ruling on closure, but I would like to have both sides' position on--  
10 what is the effect of the new Military Rule of Evidence 505 on  
11 whether--505(k) (1) (b) provides that "classified information kept  
12 under seal, the military judge must allow classified information  
13 offered or accepted into evidence to remain under seal during the  
14 trial, even if such evidence is disclosed in the court-martial  
15 proceedings and may, upon motion of the government, seal exhibits  
16 containing classified information in accordance with R.C.M. 1103(a)  
17 for any period of trial as necessary to prevent a disclosure of  
18 classified information when a knowledgeable [sic] United States  
19 official possessing authority to classify information submits to the  
20 military judge a declaration setting forth the damage to national  
21 security that the disclosure of such information, reasonably, could  
22 be expected to cause." And then the rule goes on, under 3, to say,  
23 "Closed session: the military judge may, subject to the requirements

1 of the United States Constitution, exclude the public during that  
2 portion of the presentation of evidence that discloses classified  
3 information." There is nothing in 3 that talks about requiring a  
4 knowledgeable United States official, possessing the authority to  
5 classify information, submitting to the military judge a declaration  
6 setting forth the damage to national security that the disclosure of  
7 the information, reasonably, could be expected to cause.

8 Do the parties believe that that is required for a closure?

9 TC[MAJ FEIN]: Your Honor, the United States argues it doesn't.  
10 First off----

11 MJ: Does or doesn't?

12 TC[MAJ FEIN]: Is not required for a closure, it's just a  
13 demonstration of the national security interest that must be  
14 protected. Going back to the practical application--and I know we've  
15 already litigated, but the rule have always been set up and even the  
16 current--the new M.R.E. 505--that, if during trial, for instance, a  
17 witness is about--needs to disclose classified information to answer  
18 a question, that there's flexibility, there, to allow--for instance,  
19 a court security with knowledge--to be able to look at that  
20 information or view it and then provide that required evidence to the  
21 Court to say, "Yes, this is classified information, to the best of my  
22 knowledge." And that still gives the flexibility of the Court to do  
23 that.

1           If reading this to require an actual OCA to have a  
2 declaration every single time, then that means that the entire trial,  
3 in that scenario, would have to be stopped and the new rule doesn't  
4 seem to lead to that conclusion, let alone, Your Honor, the issues  
5 with paragraph 2(a) of the rule if we're going to--if the Court's  
6 deciding to apply the new rule from this point forward.

7           MJ: Okay. So it's the government's position, then, that  
8 k(1)(b) allows the Court--so, really, the declaration is--allows the  
9 government to present independent evidence of the classified  
10 information not by someone with a--a knowledgeable United States  
11 official possessing authority to classify information? And, if after  
12 the closed session, the government wants to keep this information  
13 under seal, then the government does have to present somebody, is  
14 that your understanding?

15          TC[MAJ FEIN]: Yes, ma'am, which also makes sense because  
16 records become, of course, matters of public access through FOIA and  
17 other mechanisms. So, in order to protect those records and have  
18 them adequately protected, a proper U.S. Government official with  
19 classification authority should be reviewing that and saying, "This  
20 is, in fact, classified and this isn't." So then it really isolates  
21 exactly what was. So, as the trial progresses, it allows the Court  
22 the flexibility to allow--elicit--testimony to be elicited and  
23 continue moving the trial along. And then, once the record is

1 complete, then it's saying the--after the fact, that the government  
2 has the burden to get those declarations to identify exactly what is  
3 or is not classified for all time.

4 MJ: All right. Defense?

5 ADC[MAJ HURLEY]: Ma'am, we would agree with the government that  
6 it does not--the plain reading of the rule doesn't appear to require  
7 that declaration in advance of the testimony of a particular witness.

8 MJ: Mr. Coombs, did you have something that you wanted to add?

9 CDC[MR.COOMBS]: Just the--the rule could also apply, I think,  
10 to someone who has derivative classification authority. So, in this  
11 case, the court security officer--that's where, I believe the court  
12 security officer could provide an opinion that we need to go into a  
13 closed session because of some sort of testimony that's coming out of  
14 the witness right now that I know is classified or, if it's not  
15 classified, it would meet--it hasn't been classified before, it would  
16 meet the requirements for classification and I have derivative  
17 authority and I'll classify right now based upon some sort of  
18 classification guide that he has.

19 So I think, in that instance, it would not require an  
20 original classification authority in order to have a closed session.

21 MJ: Okay. Thank you. All right, the Court is prepared to rule  
22 on the closures.

23 Order to close certain proceedings.

1           The government moves the Court to order trial proceedings  
2 closed to the public when certain classified information is being  
3 introduced or is the subject of examination or argument to ensure the  
4 classified information specified in the government's motion is not  
5 disclosed to the public; Appellate Exhibit 479.

6           On 1 March 2013 the Court required the government to submit  
7 its request with more specificity; Appellate Exhibit 503. On 15  
8 March 2013, the government resubmitted its request with more  
9 specificity at Appellate Exhibit 505. The defense opposes, arguing  
10 that the proposed closure is not narrowly tailored and that the  
11 classified information can be protected by a reasonable alternative  
12 procedure called, "the silent witness rule" and moves the court to  
13 order a government merits witness--moved the court to order a  
14 government merits witness list to be produced for a closed Article  
15 39(a) session to determine whether reasonable alternatives to closure  
16 exist; Appellate Exhibit 513.

17           That closed session Article 39(a) session was held on 8 May  
18 2013. The witness discussed classified--discussing classified  
19 information was Ambassador Don Yamamoto, acting Assistant Secretary  
20 for African Affairs, U.S. Department of State. Having considered  
21 classified and unclassified filings by the parties, the evidence  
22 presented, oral argument, and the closed Article 39(a) session of 8  
23 May 2013, the Court finds the rules as follows:

Findings of fact.

1. The government moves to close the Court for portions of testimony that discuss the substance of classified information for the following 24 witnesses: 10 merits witnesses, 13 sentencing witnesses, and one witness for merits and sentencing:

a. Brigadier General Robert Carr will provide classified information relevant to the pre-sentencing phase of the trial.

b. Colonel Julian Chesnutt will provide classified testimony relevant to the presentencing phase of the trial.

c. Ms. Elizabeth Dibble will provide classified testimony relevant to the presentencing phase of the trial.

d. Rear Admiral Kevin Donegan will provide classified testimony relevant to the presentencing phase of the trial.

e. Mr. John Feeley will provide classified testimony relevant to the presentencing phase of the trial.

f. Ambassador Patrick F. Kennedy will provide classified testimony relevant to the presentencing phase of the trial.

g. Mr. John Kirchofer will provide classified testimony relevant to the presentencing phase of the trial.

h. Ambassador Michael Kozak will provide classified testimony relevant to the presentencing phase of the trial.

i. Mr. Danny Lewis will provide classified testimony relevant to specifications four, six, eight, 12, and 16 of charge II.



1           j. Mr. Randall McRobbie will provide classified testimony  
2 relevant to the presentencing phase of the trial.

3           k. Mr. James McCarl will provide classified testimony  
4 relevant to the presentencing phase of the trial.

5           l. Major General Kenneth McKenzie will provide classified  
6 testimony relevant to the presentencing phase of the trial.

7           m. Mr. James Moore will provide classified testimony  
8 relevant to the specification of charge I, and specifications 1, 12,  
9 and 13 of charge II.

10          n. Major General Michael Nagata will provide classified  
11 testimony relevant to the presentencing phase of the trial.

12          o. SSA Alexander Otte will provide classified testimony  
13 relevant to the specification of charge I and specification one of  
14 charge II.

15          p. Ambassador David Pearce will provide classified  
16 testimony relevant to the specification of charge I and  
17 specifications one, 12, and 13 of charge II.

18          q. Mr. Adam Pearson will provide classified testimony  
19 relevant to the presentencing phase of the trial.

20          r. Mr. H. Dean Pittman will provide classified testimony  
21 relevant to the specification of charge I and specifications one, 12,  
22 and 13 of charge II.

1 s. Ambassador Steven Seche will provide classified  
2 testimony relevant to the specification of charge I and  
3 specifications one, 12, and 13 of the government to.

4 i. Mr. David Shaver will provide classified testimony  
5 relevant to specification three of charge II, and classified  
6 testimony relevant to presentencing phase of the trial.

7 u. Ms. Cathryn Strobl will provide classified testimony  
8 relevant to specifications three and 15 of charge II.

9 v. Ambassador Don Yamamoto will provide classified  
10 testimony relevant to the specification of charge I and  
11 specifications one, 12, and 13 of charge II.

12 w. Ambassador Marie Yovanovitch will provide classified  
13 testimony relevant to the specification of charge I and specification  
14 one, 12, and 13 of charge II; and,

15 x. Mr. Joseph Yun will provide classified testimony  
16 relevant to the specification of charge I and specifications one, 12,  
17 and 13 of charge II.

18 2. On 28 March 2013, the defense moved the Court to order  
19 the government to produce a merits witness and a sentencing witness  
20 to go through a dry run of the classified testimony in a closed  
21 Article 39(a) session to address whether there are reasonable  
22 alternatives to closure available. On 10 April 2013 the Court  
23 ordered the government to produce a dry run merits witness to

1 determine whether there are reasonable alternatives to closure  
2 available. The government produced Ambassador Don Yamamoto as a dry  
3 run merits witness. On 8 May 2013, Ambassador Yamamoto testified  
4 during a closed Article 39(a) session. The government examined  
5 Ambassador Yamamoto both with and without the use of alternatives.  
6 The defense then examined Ambassador Yamamoto with the use of  
7 alternatives. During the testimony, using alternatives, there was at  
8 least one incident where a spillage of classified information would  
9 have resulted had the testimony been given in open court.

10           3. On 10 April 2013 the Court ruled that the government  
11 had not provided the Court with evidence of the classified nature for  
12 all of the classified information at issue to allow the Court to  
13 properly apply the test for closure set forth in R.C.M. 806(b)(2) and  
14 make case-appropriate specific findings; Appellate Exhibit 517. The  
15 Court ordered the government to provide the Court with evidence of  
16 the classified nature of each specific piece of classified  
17 information the government seeks to assert has an overriding interest  
18 justifying closure by 7 May 2013. On 7 May 2013 the government  
19 requested leave until 10 May 2013 to which the government did not  
20 object. The Court granted the government motion.

21           4. On 10 May 2013 the government, *ex parte*, presented the  
22 following evidence related to the national security interest for the  
23 classified information for which the government seeks trial closure:

1           1) A letter from the Department of Defense with references  
2 to six security classification guides;

3           2) A letter from the Defense Intelligence Agency with  
4 references to two security classification guides;

5           3) A letter from the Department of State with references to  
6 one security classification guide;

7           4) Classification reviews of the charge documents;

8           5) Classification reviews for evidence that the government  
9 intends to use at trial; and,

10          6) The classification reviews enclosed to the government's  
11 Military Rule of Evidence 505(i)(2) filing dated 31 January 2013;  
12 Appellate Exhibit 477.

13          5. No evidence has been presented that the classified  
14 information at issue is lawfully in the public domain or has been  
15 officially acknowledged by the government.

16          6. The Court reviewed, *in camera*, the letters from the  
17 three above mentioned organizations and the relevant classification  
18 reviews which cite the reasons why the information is classified,  
19 enclosures one through six of the government's evidence of the  
20 classified nature of the information as noted as an overriding  
21 interest justifying closure dated 10 may 2013.

22          7. The proffered testimony and accompanying letters and  
23 classification reviews demonstrate by a preponderance of the evidence

1 that the testimony sought to be introduced is properly classified by  
2 an authorized original classification authority applying the  
3 standards in Executive Order 13526.

4           8. Public disclosure of the classified information  
5 reasonably could be expected to cause serious harm to the national  
6 security of the United States as described in the specification  
7 reviews--classification reviews, excuse me--as it pertains to  
8 intelligence activities, intelligence sources and methods, and the  
9 foreign relations and foreign activities of the United States, the  
10 unauthorized disclosure of which reasonably could be expected to harm  
11 the national defense and foreign relations of United States;  
12 enclosures one through six of the government's evidence of classified  
13 nature of the information asserted as an overriding interest  
14 justifying closure dated 10 May 2013.

15           The law.

16           1. The Court's 13 April 2013 ruling and order, "Interplay  
17 between M.R.E. 505, R.C.M. 806 and *United States v. Grunden*,  
18 specificity of classified information and John Doe," sets forth the  
19 Court's view of the law regarding closure of trial proceedings under  
20 the First and Sixth amendments. R.C.M. 806(b)(2) and M.R.E  
21 505(j)(5); the Court notes that the President has implemented, by  
22 Executive Order, amendments to the M.R.E. 505 effective 15 May 2013.

1 The amendments do not change the Court's substantive view of the  
2 interplay between M.R.E. 505, R.C.M. 806, and *US v. Grunden*.

3           2. When the government seeks closure of trial--Court  
4 proceedings, the constitutional test incorporated by R.C.M. 806(b)(2)  
5 requires the government to demonstrate that; one, there is a  
6 substantial probability that an overriding interest would be  
7 prejudiced if proceedings remain open; two, closure is no broader  
8 than necessary to protect the overriding interest; three, reasonable  
9 alternatives to closure were considered and found inadequate. The  
10 evidence presented must be sufficient to allow the Court to make  
11 case-specific findings on the record justifying closure.

12           3. Where the basis for a proposed closure of portions of  
13 the trial is to protect against disclosure of classified information,  
14 the government must demonstrate that the information is properly  
15 classified, the closure of the proceedings during presentation of  
16 classified information is necessary to protect national security of  
17 United States and that the proposed closing is narrowly tailored so  
18 the proceedings are closed to the absolute minimum necessary to  
19 protect national security information; *United States v. Grunden* 2 MJ  
20 116, Court of Military Appeals, 1977.

21           4. The Court of Appeals for the Armed Forces has  
22 recognized that the protection of classified information can be an  
23 overriding interest that will be prejudiced if the proceedings remain

1 open. When closing proceedings to protect national security of  
2 United States by preventing disclosure of classified information the  
3 Court must make individualized findings with respect to the specific  
4 information the government asserts requires protection from public  
5 disclosure, identify each witness that will testify regarding the  
6 classified information, and close the Court only during those  
7 portions for the presentation of evidence that actually denotes the  
8 classified information; *United States v. Lonetree*, 31 MJ 839 at 853,  
9 Navy Marine Court of Military Appeals, 1990, affirmed and remanded 35  
10 MJ 396, Court of Military Appeals 1992.

11 Case-specific findings regarding closure.

12 1. Overriding interest. The testimony sought to be  
13 introduced by the 24 witnesses has been classified at the SECRET or  
14 CONFIDENTIAL level it is properly classified by an authorized  
15 Original Classification Authority applying the standards of Executive  
16 Order 13526. The government has demonstrated that there is a  
17 reasonable danger that the presentation of classified information  
18 before the public will expose interest related to national security  
19 of United States that should not be divulged. Public disclosure of  
20 classified information in this case reasonably could be expected to  
21 cause serious harm to national security of United States as described  
22 in enclosures one through six of the government's evidence of the  
23 classified nature of the information asserted as an overriding

1 interest justifying closure, dated 10 May 2013. The government  
2 demonstrated that closure of the trial during these periods of  
3 testimony of the 24 witnesses is necessary to protect the overriding  
4 interest of national security. The Court finds that the government  
5 interest in protecting the national security and preventing the  
6 dissemination of classified information outweighs the accused's  
7 and/or the public's right to a public trial for the portion of the  
8 trial that involves disclosure of classified information at issue.  
9 M.R.E. 505--excuse me--

10 3[sic]. Narrowly tailored closure. The Court conducted a  
11 test to determine whether reasonable alternatives exist in lieu of  
12 closure. On 7 May 2013 the Court observed Ambassador Yamamoto  
13 testify during a close Article 39(a) session. The government  
14 examined Ambassador Yamamoto both with and without the use of  
15 alternatives. The defense then examined Ambassador Yamamoto with the  
16 use of alternatives. The Court finds that it is not possible for the  
17 government to elicit coherently in open court nuanced and narrative  
18 testimony about the substance of the classified information using the  
19 silent witness rule or any other code or legend not available to the  
20 public. It is also not possible for the court to understand that  
21 testimony using the silent witness rule, code or legend. The use of  
22 such alternatives for nuanced testimony--narrative testimony in open  
23 court creates complexities for the witnesses that result in an



1 unreasonable risk of spillage of classified information. Finally,  
2 presentation of narrative nuanced testimony in open court using such  
3 alternatives creates an unreasonable risk of classification by  
4 compilation with members of the public being able to connect the dots  
5 with particular pieces of information that combine that with other  
6 information to identify classified information. The Court recognizes  
7 that it is possible that certain unclassified testimony of the above  
8 24 witnesses may be elicited intermixed with classified information.  
9 In order to narrowly tailor the closure, the Court has ordered the  
10 government to present a plan to expeditiously prepare a transcript  
11 and to conduct appropriate classification reviews of the transcript  
12 of any closed session to include that of the 24 witnesses.  
13 Unclassified portions of testimony will be released to the public.  
14 Closure order by the Court is as narrowly tailored as possible to  
15 protect the accused and public right--the public's right to a public  
16 trial while protecting the classification--classified information  
17 from inadvertent public disclosure and the right of the parties to  
18 present classified evidence in a coherent manner to the factfinder.

19           3. Reasonable alternatives to closure. The court  
20 considered alternatives to receiving classified testimony including  
21 use of redactions, the silent witness rule, projected electronic  
22 displays, unclassified summaries or alternatives to testimony, and  
23 code words and names. The Court also considered the alternatives

presented by the parties during Ambassador Yamamoto's testimony.

There are no alternatives to closure for the presentation of classified information from the 24 witnesses that are reasonable or adequate. The Court has imposed the classification review requirement as an alternative to closure.

4. The Court has carefully balanced the accused's Sixth Amendment right to a public trial and the public's First Amendment right to a public trial against the potential serious damage to national security of United States that would result from public disclosure or spillage of this information in the open session of this court-martial.

5. The overriding interest. Protecting national security information from disclosure outweighs any miscarriage of justice-- danger of miscarriage of justice that could arise from taking portions of the testimony of the 24 witnesses in closed session of this court-martial.

Order.

[1.] Court-martial will be closed to the public during the portions of testimony of the above 24 witnesses discussing the substance of classified information.

2. After each of the 24 witnesses has testified, the Court will expeditiously prepare a transcript of the testimony and conduct appropriate classification reviews of the transcript. A redacted

1 copy containing any unclassified testimony will be released to the  
2 public. The Court is currently evaluating the proposed  
3 transcription/classification review plan submitted by the government  
4 on 20 May 2013; Appellate Exhibit 548.

5 So ordered this 21st day of May of 2013.

6 Now, just a couple of things that are not in the written  
7 order. In the closed session there were certain items that the  
8 government had planned to elicit in closed session that are obvious  
9 on the face of the documents of the charged--on the face of the  
10 charged documents. As the Court said during that closed session,  
11 things such as what kind of a classification it is, taglines, etc.,  
12 that are evident from the face of the document can be held in open  
13 session certainly with using some kind of a code or just directing  
14 the fact-finder to where it is. So, the government will narrowly  
15 tailor the closed portion as much as possible with respect to that.  
16 The Court also made its relevance ruling earlier today. So, the  
17 Court is going to be keeping a fine eye on the M.R.E. 403 aspect of  
18 testimony, particularly with respect to Specifications 12 and 13 of  
19 Charge II. Again, the goal of, I think a lot of the testimony that  
20 may have been elicited may have some relevance issues.

21 Anything else we need to address?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: One moment, please? [Pause] No, ma'am.

1 MJ: Okay. This order will be added as the next Appellate  
2 Exhibit in line. The last thing I have on my agenda is the case  
3 calendar which as far as I understand there has been no changes since  
4 the defense last did not object to the one the government proposed.

5 Is that still the case?

6 CDC[MR. COOMBS]: That is correct, Your Honor.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: So, our next proceeding then, this will be the last Article  
9 39(a)--pretrial Article 39(a) session that we conduct. The next  
10 session will be on June 3 starting at 0930, is that correct?

11 TC[MAJ FEIN]: Yes, ma'am.

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: One question I do have for you, I have not received any  
14 request from the government with respect to opening statements or  
15 opening statement and closure. Am I going to get any?

16 TC[MAJ FEIN]: No, ma'am.

17 MJ: Okay. Anything from--well, defense I assume not?

18 CDC[MR. COOMBS]: No, ma'am.

19 MJ: Anything else we need to address today?

20 TC[MAJ FEIN]: No, ma'am.

21 CDC[MR. COOMBS]: No, Your Honor.

22 MJ: Court's in recess.

23 **[The Article 39(a) session recessed at 1413, 21 May 2013.]**

1 [The Article 39(a) session was called to order at 0956, 3 June 2013.]

2 MJ: This Article 39(a) session is called to order. Major Fein,  
3 please account for the parties.

4 TC[MAJ FEIN]: Yes, ma'am. Your Honor, all parties when the  
5 court last recessed are again present with the following exceptions:  
6 Captain von Elten is absent and Captain Morrow is present.

7 MJ: All right. Why don't we begin by announcing the new  
8 appellate exhibits that have been. added to the record.

9 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, the 21st of May  
10 2013, the defense filed a witness list addendum. It's been marked as  
11 Appellate Exhibit 554. On 21 May 2013, the government witness order  
12 for the first 25 witnesses. It was published, or it was filed and  
13 that is Appellate Exhibit 552. On the 21st of May 2013, the  
14 governments proposed daily trial schedule was filed and it's been  
15 marked as Appellate Exhibit 553.

16 MJ: Let me stop you for just a moment.

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: Mr. Coombs, did the defense have any objection to the  
19 governments proposed trial plan?

20 CDC[MR. COOMBS]: No, Your Honor.

21 MJ: All right and I believe that the email to that effect has  
22 also been filed as an Appellate Exhibit with the original trial plan.

23 Go ahead Major Fein.

1 TC[MAJ FEIN]: Yes, ma'am, and one correction, Your Honor, the  
2 governments proposed trial plan is marked as 553 Alpha and the  
3 defense's email that states no objection is 553 Bravo.

4 Your Honor, on the 30th of May 2013, Your Honor, the 23rd  
5 of May 2013, there were, Your Honor, there is two immunities that  
6 have been filed but they have not been marked the court, during the  
7 802 discussed that we will address those later with the witnesses.

8 Your Honor, on the 31st of May 2013, the government filed  
9 M.R.E. 505(j)(2) motion for use of alternatives. This was via  
10 SIPRNET. This has been marked as Appellate Exhibit 555. And then  
11 the same day the United States filed an unclassified and redacted  
12 version and that has been marked as Appellate Exhibit 556.

13 On the 1st of June 2013 ----

14 MJ: Hold on. Before you go there. Defense, do you have any  
15 objection to the 505 filing by the government?

16 CDC[MR. COOMBS]: No, Your Honor.

17 MJ: All right. Thank you. Proceed.

18 TC[MAJ FEIN]: Yes, ma'am. Your Honor, on the 1st of June, 2013,  
19 the government filed an updated Section 3 disclosure that has been  
20 marked as Appellate Exhibit 557. And then, Your Honor, on 31 May,  
21 2013, a third -- the court received a third-party request that has  
22 not been filed by either party but has been marked as Appellate  
23 Exhibit 558.

1 MJ: All right. Is this the request from three non-- three third-  
2 party people who are not parties to the trial?

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: Leon Simpage, Scott Galindez and Kay Ruton?

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: All right. And that's been marked as an appellate exhibit  
7 also?

8 TC[MAJ FEIN]: Yes, Your Honor. That is marked as Appellate  
9 Exhibit 558.

10 MJ: All right. Does the government have a position with respect  
11 to this request for public access or in the alternative motion to  
12 intervene to vindicate the right of public access?

13 TC[MAJ FEIN]: No, Your Honor.

14 MJ: Defense?

15 CDC[MR. COOMBS]: No, Your Honor.

16 MJ: All right. The court will take this under advisement.

17 Government, anything else?

18 TC[MAJ FEIN]: No, Your Honor.

19 MJ: All right. All right. Before we continue, I do want to go  
20 back to something that was filed at the last time, the court's  
21 closure ruling discussed the preparation of a transcript and a  
22 classification review after that. I'm not quite sure what appellate  
23 exhibit that was.

1 TC[MAJ FEIN]: Your Honor, it's Appellate Exhibit 548.

2 MJ: It was a 20 May 2013, prosecution proposed plan for  
3 expeditious transcription plan. It was basically proposed in three  
4 phases, Transcription, Phase I; Errata and Authentication, Phase II;  
5 and Classification Review, Phase III. Defense, do you have any  
6 objection to Phases I and II?

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: All right. Government, again with respect to Phase III,  
9 what the court would like is for each individual closure there will  
10 be a plan in place and a time line for the classification review for  
11 each of the specific closures prior to the closure, so the court will  
12 know what it is before allowing the closure. Is that understood?

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: Defense, in light of that, any objection to Phase III?

15 CDC[MR. COOMBS]: No, Your Honor.

16 MJ: And I would like for the government to set forth for the  
17 record, what are the procedures that have been put into place for  
18 public access to this trial?

19 TC[MAJ FEIN]: Yes, ma'am. Ma'am, there are two different sets  
20 of procedures that have been put in place for public access. First,  
21 the United States will discuss the general public and then the press'  
22 access.

23 MJ: All right.



1 TC[MAJ FEIN]: First, Your Honor, the general public. There are  
2 sixteen seats presently in the court that are dedicated to the  
3 public's access to sit in this court martial within the actual  
4 confines of the courtroom. There is a trailer which is an extension  
5 of the courtroom with a feed from this courtroom based off the  
6 cameras and that seats 35 individuals. And then if there is an  
7 overflow of those 35 individuals in the trailer, Your Honor, there is  
8 a theater next door to this courthouse that seats presently 100  
9 individuals or could seat 100 individuals. However, there is  
10 flexibility up to 540 based off of the fire marshal coming in and  
11 changing some arrangement of the seats, if needed. That's the  
12 general public, Your Honor. As far as the media, Your Honor, there  
13 are ten positions, ten seats in this courtroom for media  
14 organizations that are credentialed and there's also two additional  
15 seats for two credentialed sketch artists. At the media operations  
16 center offsite down the street there is seats for 70 credentialed  
17 members of the media. And then, Your Honor, there is a press pit and  
18 a satellite truck area of a live feed and there is a currently  
19 unlimited space in both the press pit and the satellite truck live  
20 feed area.

21 MJ: All right. You said credentialed media. Is there criteria  
22 for credentialing?

1 TC[MAJ FEIN]: Yes, Your Honor. What the United States just had  
2 marked as Appellate Exhibit 561. Appellate Exhibit 561 is a copy of  
3 the latest media advisory published by the United States Army  
4 Military District of Washington Public Affairs Office dated May 10,  
5 2013. This advisory outlines the criteria for members of the media  
6 to be credentialed. Just to highlight a few areas, Your Honor.  
7 First, credentials will be granted to reporters from the following  
8 types of news media, newspaper, weeklies and magazines; wire  
9 services, broadcast media, web media and accredited free-lance  
10 writers. The media advisory goes further in defining the required  
11 material for each of those categories. And then the media advisory  
12 also outlines a deadline for registration on the second page.  
13 Registration had to be completed no later than 2:00 p.m. Wednesday,  
14 May 29 with the following information provided. This was what was  
15 published out and this is what the rules needed to be followed in  
16 order to be credentialed.

17 MJ: All right. Would the government also discuss what  
18 electronics are allowed or not allowed in the various places, noting  
19 for the record that R.C.M. 806(c) prohibits video and audio  
20 recording, taking photographs, radio, or television broadcasting and  
21 those are the court rules as well.

22 TC[MAJ FEIN]: Yes, ma'am. As the court just alluded, to Your  
23 Honor, not only the R.C.M., but the Trial Judiciary Rules prohibit

1 recording devices. So, in the courtroom, Your Honor, the rules are  
2 strictly followed and the extension of the courtroom, meaning the  
3 trailer that holds spectators, and the theater the same rules apply.  
4 The court has approved a relaxation of the rules in the media  
5 operations center solely for the purpose for having laptops to  
6 prepare stories for publications, but no live recording or live  
7 publication. It is not until there is a recess when court is not in  
8 session that members of the media are allowed to upload or connect  
9 outside of media operations center, and then during that recess  
10 that's when news stories will be published. And again, there's no  
11 recording devices authorized. So laptop computer, handheld recording  
12 devices or cellphones are not authorized according to the court  
13 rules.

14 MJ: What about stenographic equipment?

15 TC[MAJ FEIN]: Your Honor, the United States would say that a  
16 Stenograph is being used as long as it is not recording the  
17 information then it is not a recording device. If it is a Stenograph  
18 with a stenographer, a traditional one without recording capability,  
19 then that would fall within the rules of being permitted.

20 MJ: All right. Thank you. Defense, do you have anything to  
21 add?

22 CDC[MR. COOMBS]: No, Your Honor.

1 MJ: All right. And finally, has Appellate Exhibit 561 been  
2 publicly available?

3 TC[MAJ FEIN]: Yes, Your Honor. It was published out by,  
4 actually by the public affairs office through media distribution.

5 MJ: All right. Thank you. And for the record, counsel and I  
6 held a brief R.C.M. 802 conference. Once again, that is a conference  
7 where I talk about scheduling and logistics issues with counsel and  
8 we basically just discuss sort of the order of march on how we're  
9 going to go, how we're going to proceed today and the things that we  
10 just announced were pretty much what we discussed. The government's  
11 proposed trial plan, I haven't actually authorized a proposed trial  
12 plan. What I did talk to counsel about is we're going to try the  
13 government's proposed trial plan this week which basically provides  
14 for a brief R.C.M. 802 conference before we begin, starting court at  
15 0930, we were a little bit late today, and ending approximately six  
16 o'clock or 1800. We're going to try that this week, see how it  
17 works, see if there's any modifications that need to be made and the  
18 court will come out with something more definitive probably by the  
19 end of the week. But that's the proposed plan for this week.  
20 Is there anything else, counsel, that we need to address before I go  
21 over with PFC Manning just briefly, it's been a long time since we've  
22 had arraignment, forum selection and plea, so I just want to go  
23 through those briefly and just make sure that your selections that

1 you made are still your selections today. Is there anything else we  
2 need to address?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor.

5 MJ: All right. PFC Manning, we talked a long time ago about  
6 your rights to counsel and you requested to be represented by Mr.  
7 Coombs as your civilian defense counsel, by Major Hurley as your  
8 individual military counsel, and by Captain Tooman as your detailed  
9 defense counsel.

10 Is that still your selection today?

11 ACC: Yes, Your Honor.

12 MJ: Do you want any further explanation of your rights to  
13 counsel or do you believe you understand them?

14 ACC: I understand them.

15 MJ: And back I believe in February you made a forum selection  
16 which was trial by military judge alone. We went through the  
17 colloquy there going over your right to trial with members, officer  
18 panel or enlisted panel, or your right to trial by military judge.  
19 You elected military judge alone knowing that I would be the military  
20 judge.

21 Is that still your forum selection?

22 ACC: Yes. Yes, ma'am.

1 MJ: Also back in February you entered pleas to lesser included  
2 offenses of a number of the offenses that were charged. Do you still  
3 desire to continue with your guilty plea to those lesser included  
4 offenses?

5 ACC: Yes, Your Honor.

6 MJ: Do you have any changes, Mr. Coombs or PFC Manning to those  
7 pleas?

8 CDC[MR. COOMBS]: No, Your Honor.

9 MJ: PFC Manning?

10 ACC: No, Your Honor.

11 MJ: All right. Let's talk about some stipulations of expected  
12 testimony that the parties have agreed to.  
13 Major Fein, if you could list those and what appellate exhibits those  
14 are, please?

15 TC[MAJ FEIN]: Yes, Your Honor. The first is what has been  
16 marked as PE for Identification, PE 21 for Identification, Sergeant  
17 Mary Amiatu. Prosecution Exhibit 23 for Identification, Special  
18 Agent Calder Robertson. Prosecution Exhibit 26 for Identification,  
19 Special Agent Tony Edwards. Prosecution Exhibit 27 for  
20 Identification, Special Agent Charles Clapper. Prosecution Exhibit  
21 28 for Identification, Mr. Garon Young. Prosecution Exhibit 29 for  
22 Identification, Mrs. Tamara Mairena. And Prosecution Exhibit 36 for  
23 Identification, Staff Sergeant Alejandro Marin.

1 MJ: Is that seven stipulations of fact in total?  
2 TC[MAJ FEIN]: It is, Your Honor.  
3 MJ: PFC Manning, do you have a copy of all of those stipulations  
4 of expected testimony before you?  
5 ACC: Yes, Your Honor.  
6 MJ: Now, on the end of each of those stipulations are three  
7 signature blocks; one for the trial counsel, one for the defense  
8 counsel and one for you.  
9 Did you sign all of those stipulations?  
10 ACC: Excuse me, ma'am? Yes. Yes, ma'am.  
11 MJ: PFC Manning, when I ask you questions, please take your  
12 time, whatever time you need.  
13 ACC: Yes, ma'am.  
14 MJ: Did you read those stipulations thoroughly before you  
15 signed them?  
16 ACC: Yes, Your Honor.  
17 MJ: Do you understand the contents of the stipulation?  
18 ACC: Yes, Your Honor.  
19 MJ: The stipulations. Before signing the stipulations did your  
20 defense counsel explain to you what the stipulations are?  
21 ACC: Yes, ma'am.  
22 MJ: All right. Do you understand you have an absolute right to  
23 refuse to stipulate to anything in this case?

1 ACC: Yes, ma'am.

2 MJ: Now, you understand you should enter into these  
3 stipulations only if you believe it's in your best interest to do  
4 that?

5 ACC: Yes, Your Honor.

6 MJ: Now, we've discussed stipulations before. You've entered  
7 one stipulation of fact and two stipulations of expected testimony  
8 already and we talked about the differences in that. All seven of  
9 these are stipulations of expected testimony. Now, what those are,  
10 are, when counsel for both sides and you agreed to stipulations of  
11 expected testimony, you are agreeing that if each of these witnesses  
12 was here testifying under oath they would testify substantially as to  
13 what is in the stipulation of expected testimony. The stipulation  
14 can be attacked, contradicted or explained in the same way as if the  
15 person were here testifying in court. So it's different from a  
16 stipulation of fact where you're saying this is factually true. In  
17 the stipulation of expected testimony, you're agreeing that this is  
18 what this person would say.

19 Do you understand the distinction?

20 ACC: Yes, that's correct, Your Honor.

21 MJ: And then what I've told you and what your defense counsel  
22 told you earlier about each of these stipulations, do you still  
23 desire to enter into each of these stipulations?



1 ACC: Yes, Your Honor.

2 MJ: Do counsel concur in the contents of each of these seven  
3 stipulations?

4 TC[MAJ FEIN]: Yes, Your Honor.

5 CDC[MR. COOMBS]: Yes, ma'am.

6 MJ: Each of those stipulations is admitted into evidence. May  
7 I have them, please?

8 [The court reporter handed the military judge the seven prosecution  
9 exhibits.]

10 MJ: All right. Thus Prosecution Exhibits 36, 29 -- I have a  
11 Prosecution Exhibit Blank for Identification. I think we just need  
12 to add that one. 26. 28. 27. Oops, I have two 26s.

13 All right. 26, Prosecution Exhibit 26, dated 3 June 2013,  
14 is admitted. That would be the stipulation of expected testimony of  
15 Special Agent Antonio Edwards. Prosecution Exhibit 23 for  
16 Identification is admitted. And finally Prosecution Exhibit 21 for  
17 Identification is admitted. That is seven stipulations of expected  
18 testimony.

19 Now, is there anything else we need to address before we  
20 proceed to opening? I understand the government was planning on  
21 using a slide show that the defense had not seen yet. Are there, do  
22 we need a recess before we continue?

23 CDC[MR. COOMBS]: Yes, Your Honor.

1 TC[MAJ FEIN]: Yes, Your Honor. We also have a copy for the  
2 court.

3 MJ: All right. How long of a recess do we need? Well, before  
4 we recess, is there anything else we need to take up before we  
5 proceed to opening statements?

6 CDC[MR. COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: How long of a recess do you need?

9 CDC[MR. COOMBS]: Defense would request an 802 at 10:30, Your  
10 Honor.

11 MJ: Does that comport with the government's idea?

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: All right. Court is in -- well, the recess will be longer  
14 than that then. How long do you the the recessing will be?

15 CDC[MR. COOMBS]: I believe the 802 will take around 15 minutes,  
16 and depending on what the court does there, the government might need  
17 some time to make adjustments.

18 MJ: All right. Well, why don't we do this? We'll put the court  
19 in recess then at least until quarter to eleven. We'll send the  
20 bailiff outside to advise everyone if that recess will go longer.

21 TC[MAJ FEIN]: Yes, ma'am.

22 MJ: Court is in recess.

23 **[The court-martial recessed at 1018, 3 June 2013.]**

1 [The court-martial was called to order at 1056, 3 June 2013.]

2 MJ: Court is called to order. Let the record reflect all  
3 parties present when the court last recessed are again present in  
4 court. Before we proceed to discuss the government slide show I did  
5 have one more question, or a couple more questions with respect to  
6 public access to this court-martial. Major Fein, you testified  
7 earlier -- you stated for the record earlier that the theater has  
8 been used as an overflow room. We've had a number of Article 39(a)  
9 sessions since this case was referred back in February of 2012. Can  
10 you please state for the record how many times that theater has been  
11 used as an overflow during this ----

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: Since these proceedings.

14 TC[MAJ FEIN]: Since the court-martial has been referred to this  
15 court, the theater has not been used. It has only been used, although  
16 available, it has been used the first day of the Article 32 hearing  
17 prior to referral.

18 MJ: And with respect to the fact that it hasn't been used  
19 during these proceedings, is that because it was not necessary ----

20 TC[MAJ FEIN]: Yes, Your Honor.

21 MJ: ---- that the public was accommodated by the other, by I  
22 guess the courtroom itself and the media operations center?

1 TC[MAJ FEIN]: Yes, ma'am, that is precisely it. Although  
2 available, the Garrison is ready to use it when needed, but there has  
3 not been a queue or line of individuals that could not attend and  
4 observe the court-martial. And it is open today if needed.

5 MJ: Is the theater being used today?

6 TC[MAJ FEIN]: Your Honor, my understanding is it is anticipated  
7 to be used. I do not know if it is currently being used.

8 MJ: All right. Has any specific person been excluded from  
9 attendance at either in court, in the media center, or in the --  
10 well, in the overflow room, any of those three venues?

11 TC[MAJ FEIN]: Ma'am, there have not been as far as the general  
12 public, to the best of the prosecution's knowledge there has not been  
13 anyone excluded without the court's -- without court's directions,  
14 so, no. As far as the media, Your Honor, there were five members of  
15 the media that were not credentialed. Two were not listed in the  
16 BOCUS system which is one of the requirements of being registered in  
17 this, in commercial, independent commercial press service  
18 organization. That was in the media advisory. Two were not in the  
19 BOCUS and three submitted their credentialing late so they were not  
20 credentialed. Otherwise everyone has access to the media operations  
21 center. And those individuals, Your Honor, still have access to the  
22 press pit and the satellite live -- the satellite live feed area.

23 MJ: What is a press pit and satellite live feed area?

1 TC[MAJ FEIN]: Your Honor, the press pit is an area where there  
2 can be -- it's a congregation of members of the media to ask  
3 questions and to receive answers. And then the satellite truck live  
4 feed area is where there are satellite trucks for national or local  
5 media organizations where they can have live update, live reporting.  
6 That's another area that is segregated. And right now it's unlimited  
7 space for those two areas.

8 MJ: All right. Defense, do you have any reason to believe  
9 otherwise?

10 CDC[MR. COOMBS]: No, Your Honor.

11 MJ: Also for the record the government filed its motion for use  
12 of alternatives under M.R.E. 505(j)(2). We discussed that earlier,  
13 the defense had no objection to it. The court never actually ruled  
14 on that, so the court will grant that motion with respect to  
15 paragraphs, one, two and four which is use of the information at  
16 trial and will address the sealing issue later.

17 TC[MAJ FEIN]: Yes, Your Honor.

18 MJ: Okay. Now, with respect to the government's proposed slide  
19 show. Defense?

20 CDC[MR. COOMBS]: Yes, Your Honor. The defense reviewed the  
21 slide show this morning. There are two areas where the defense would  
22 have an objection. Page three of the government's slide  
23 presentation, at least the version the defense has received, has two

1 slides per page. And then also Page 18 through 20 of the  
2 government's slide show presentation. And the basis for our  
3 objections would be authentication. The defense's understanding of  
4 how the government obtained the 2009 WikiLeaks Most Wanted List was  
5 by having one of their forensic examiners use a program to search the  
6 Internet history in order to be able to pull something that at one  
7 time existed on the Internet. This witness doesn't have personal  
8 knowledge that this is the WikiLeaks 2009 Most Wanted List, so in  
9 addition to authentication problems under M.R.E. 901 we would say  
10 personal knowledge.

11 MJ: Why would he have to have personal knowledge if he is just  
12 going to see what's on the Internet at a given time?

13 CDC[MR. COOMBS]: Because the only reason it's relevant is if  
14 the government is arguing if this is in fact the WikiLeaks 2009 Most  
15 Wanted List, and this witness has no personal knowledge of that to  
16 lay the foundation for the authentication of -- for this item. In  
17 addition, because the government is offering it, would be trying to  
18 elicit information from it, there's hearsay objections, so M.R.E.  
19 801. In this case probably hearsay within hearsay because the  
20 forensic expert is going to be testifying about something he read or  
21 seen that apparently was placed on the Internet. But then more  
22 importantly, a relevance objection under M.R.E. 401. And also an  
23 objection under M.R.E. 403. The 2009 WikiLeaks Most Wanted List, the

1 government apparently wants to use that to suggest that PFC Manning  
2 was taking his direction from WikiLeaks, and there's simply no  
3 evidence to support that. In fact, when you look at the 2009 most  
4 wanted list, if in fact we do, one of the items is General Order  
5 Number 1, that's the -- probably the easiest thing that somebody  
6 could obtain, and WikiLeaks doesn't have that. And so there is no  
7 real evidence to suggest that PFC Manning was using this list as a  
8 guide for what he would be giving to WikiLeaks.

9           Additionally, there's no forensic connection between PFC  
10 Manning and this list. The government at no time in their minute-by-  
11 minute account of what PFC Manning was doing on SIPRNET computers  
12 found any reference to searches that track this whole list. At best  
13 they found something that they could argue that, oh, this kind of  
14 looks like something that's on this list. So the defense's position  
15 on this is that it's simply not relevant. And to the extent that  
16 there is some minor relevance as to circumstantial evidence, it's  
17 unfairly prejudicial because, again, PFC Manning was not taking his  
18 direction from WikiLeaks.

19           MJ: All right. Thank you. Government, please address each  
20 basis of the defense's objection.

21           TC[MAJ FEIN]: Yes, ma'am. First, authentication. United  
22 States intends to call special agents who used what other courts have  
23 approved or have allowed for authentication purposes an approved

1 method of searching historic records that existed at the time on the  
2 Internet using what's called the way back machine, and then  
3 independently looking at other processes like the Google cache and  
4 other information to confirm that that is the WikiLeaks most wanted  
5 list from that time. That's what the special agent did himself. He  
6 used this device or this website. He used it in the way that it's  
7 intended to be used and we intend to present evidence to that point.  
8 So that's authentication, Your Honor, and he actually downloaded it.  
9 In fact, the versions that are being used are the ones he printed and  
10 signed after he did it.

11           As far as the hearsay, Your Honor, first and foremost, the  
12 United States isn't offering it for the truth of the matter asserted,  
13 but effect on the listener, PFC Manning. The government intends to  
14 show evidence that he used this as a guide, as a menu to do his  
15 searches and figure out what he was going to give WikiLeaks and not,  
16 and that's what the evidence is going to show. Example, Your Honor,  
17 from the slide show using what the defense just offered is that the  
18 Intelink logs which are what the minute-by-minute account evidence we  
19 have, and that's from a SIPRNET system that the WikiLeaks most wanted  
20 list was not on, PFC Manning searched for a term such as GTMO SOPs,  
21 detainee abuse and interrogation and that was around December, late  
22 November, December of 2009. Those exact things are what WikiLeaks



1 was asking for and is listed on the WikiLeaks most wanted screen  
2 shot. So the relevance there is clear, Your Honor.

3           The reason the United States isn't offering or doesn't have  
4 what the defense is claiming we must have, which is a forensic trail  
5 to show PFC Manning on this, and that's why United States would argue  
6 and will argue later circumstantial evidence, is because Private  
7 First Class Manning wiped his personal Macintosh computer,  
8 forensically cleared it so there's no forensic evidence on 25 January  
9 2010, and evidence will show that as well, Your Honor. So it is  
10 authentic or the United States will be able to show it's authentic  
11 and defense will be able to object and we'll be able to litigate this  
12 issue, but we do have a good faith basis to believe that it is what  
13 it purports to be and it is otherwise admissible. And believe it's -  
14 - we would not be offering it for hearsay purposes, but it's the  
15 effect on listeners. Why and what drove PFC Manning to do the  
16 searches he did, which we do have forensics for.

17           MJ: All right. Well, the court will rule on all these when the  
18 evidence is actually presented. As far as opening statement, this is  
19 a judge alone trial. The court is well versed in ruling on motions  
20 and disregarding evidence should I find that it is not authenticated  
21 properly, that it is offered as improper hearsay or it's not relevant  
22 or is unduly prejudicial. So I can unring the bell should that need  
23 be. So government, I believe you established a good faith basis to

1 at least use it as part of your opening statement. So defense  
2 objections at this point are overruled. But again, I'm not ruling on  
3 the admissibility of the evidence at this time.

4 CDC[MR. COOMBS]: Yes, Your Honor.

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: All right. Anything else we need to address before we  
7 proceed with opening statements?

8 CDC[MR. COOMBS]: No, Your Honor.

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: All right. As once again, you're all familiar with,  
11 opening statements are not evidence, rather they are what counsel  
12 expect the evidence will show in the case.

13 Does the government have an opening statement?

14 ATC[CPT MORROW]: Yes, Your Honor.

15 MJ: Proceed.

16 ATC[CPT MORROW]: May it please the court? If you had  
17 unprecedented access to classified networks 14 hours a day, seven  
18 days week for eight plus months, what would you do? The evidence  
19 will show that those are the words of PFC Bradley Manning, Your  
20 Honor. This is not a case about an accidental spill of classified  
21 information. This is not a case about a few documents left in a  
22 barracks or two. This is not a case about a government official who  
23 made discrete targeted disclosures of classified information based on

1 content they rate careful. This, Your Honor, this is a case about a  
2 Soldier who systematically harvested hundreds of thousands of  
3 documents on classified databases and then literally dumped that  
4 information onto the Internet and into the hands of the enemy.  
5 Material he knew, based on his training and experience, could put the  
6 lives and welfare of his fellow Soldiers at risk.

7           This is a case about what happens when arrogance meets  
8 access to sensitive information. The evidence will show that  
9 beginning in November 2009, less than 2 weeks after starting work in  
10 the Sensitive Compartmented Information Facility at FOB Hammer, Iraq.  
11 PFC Manning disregarded the judgment of senior officials, the rules  
12 governing the protection of classified information, and his own  
13 acknowledged obligation to safeguard our nation's secrets. The  
14 evidence will show that PFC Manning violated the trust of his  
15 superiors to the detriment of the Soldiers he served with and to the  
16 aid of our adversaries.

17           The evidence will show that PFC Manning used his military  
18 training to gain the notoriety he craved. In short, the evidence  
19 will show that PFC Manning knew the consequences of his actions and  
20 disregarded that knowledge in his own self-interest. Over the course  
21 of approximately 6 months the evidence will show that PFC Manning  
22 systematically and indiscriminately harvested more than 700,000  
23 government records from various SIPRNET databases and transmitted the

1 information to approve -- who advocated for random opportunists  
2 without any appropriate limits. The government will show that at  
3 every step in the process PFC Manning attempted to hide what he was  
4 doing from others. He repeatedly, the evidence will show, moved CDs  
5 containing classified information from his work station in the SCIF  
6 to his containerized housing unit. And once there, the evidence will  
7 show that PFC Manning packaged the information, encrypted the  
8 information and transmitted the information using tools designed to  
9 insure he would not be caught. And after transmitting the  
10 information, the evidence will show that PFC Manning often took  
11 painstaking steps to erase any evidence of what he had done from his  
12 computers.

13           The evidence will show that PFC Manning repeatedly abused  
14 his access to the SIPRNET by searching for classified information  
15 with no logical nexus to the work he was supposed to be doing in  
16 Iraq. The evidence will show that PFC Manning was well-versed in the  
17 type of information, that if disclosed to unauthorized persons could  
18 reasonably be expected to cause damage to the national security. The  
19 evidence will also show that PFC Manning did not discriminate with  
20 gathering documents. The evidence will show that his interest was in  
21 gathering information in bulk. Aside from a few documents in this  
22 case, Your Honor, the evidence will show that PFC Manning's actions  
23 were not calculated transmissions of documents in onesies and

1 twosies. These were massive, massive downloads aided by PFC  
2 Manning's mastery of an unauthorized software program known as WGet,  
3 packaged and out the door to WikiLeaks in less than a few hours in  
4 some cases.

5 Finally, the evidence will show that this massive amount of  
6 information has great value to our adversaries and, in particular,  
7 our enemies. On the screen, Your Honor, is a brief road map of the  
8 government's case in chief or intended case in chief. These first  
9 several witnesses will discuss the investigation in Iraq. We'll have  
10 witnesses discuss PFC Manning's training at Fort Huachuca, PFC  
11 Manning's deployment to Iraq. And the government will proceed  
12 through the charges and specifications in essentially chronological  
13 order with the forensics relating to each charge and specification  
14 presented simultaneously as well as evidence relating to the nature  
15 of the information.

16 Your Honor, before we proceed with the charges and  
17 specifications, the government would like to highlight a few pieces  
18 of evidence and some terms you'll hear referenced throughout the  
19 trial. Some key evidence in this case, Your Honor, SIPRNET  
20 computers, Intelink logs. And when I speak of Intelink logs, Your  
21 Honor, I'm talking about the evidence will show that they are logs  
22 that capture -- audit logs that capture activity on the SIPRNET. CID  
23 agents collected a personal computer from PFC Manning's CHU, as well

1 as an external hard disc drive. An SD card which is a memory card  
2 used for portable electronic devices, it was collected from his  
3 aunt's house in Potomac, Maryland. The government will present  
4 evidence related to a computer recovered from Brookhaven National  
5 Laboratory in New York. CENTCOM SIPRNET SharePoint logs. The  
6 evidence will show that SharePoint, Your Honor, is simply a web  
7 server that's used by staff at CENTCOM to post documents, share  
8 documents. A supply annex NIPRNET computer collected because PFC  
9 Manning was moved to the supply annex towards the end of his  
10 deployment. AIT Instruction. PFC Manning signed non-disclosure  
11 agreements. And as referenced earlier, Your Honor, what the evidence  
12 will show to be a WikiLeaks most wanted list from 2009.

13 First, Your Honor, the .22 and .40 computers. When the  
14 government or when a witness refers to .22 or .40, the evidence will  
15 show that they're referring to the last octet of the two IP addresses  
16 of the SIPRNET computers collected in Iraq. The evidence will show  
17 that PFC Manning's primary SIPRNET computer was a, what's called the  
18 .22, and on that computer Special Agent Shaver will testify that  
19 there was a file, an Excel Spreadsheet, called backup.XLS. This  
20 spreadsheet, Your Honor, is evidence that the PFC Manning was  
21 cataloging his downloading of the State Department Database. In  
22 particular, Your Honor, the evidence will show that the number at the  
23 top left, 2-5-1-2-8-8 was the next number in line after the amount of

1 cables that were released on Wiki -- or Department of State cables  
2 released on WikiLeaks. The evidence will show that WikiLeaks  
3 released 251,287.

4           The secondary SIPRNET computer, Your Honor, was .40, and  
5 the Special Agent Shaver will testify that there were more than  
6 100,000 full base 64 encoded Department of State cables. Base 64,  
7 Your Honor, is simply a method of encoding information that optimizes  
8 the transmission of that information over the Internet, and the  
9 Special Agent Shaver will testify regarding this.

10           Intelink logs, Your Honor. Intelink is a SIPRNET search  
11 engine, very similar to Google, in fact, powered by Google. The logs  
12 collected in this case by CID agents, are linked to the .22 and .40  
13 addresses and those logs span the length of PFC Manning's deployment,  
14 so approximately 1 November to the end of May 2010 -- 1 November 2009  
15 to the end of May 2010. The evidence will show that those computers  
16 searched for WikiLeaks more than 100 times on the SIPRNET.

17           Next, Your Honor, Manning's personal laptop. This laptop,  
18 an Apple brand laptop, was collected from PFC Manning's personal  
19 living space on FOB Hammer and special, I'm sorry, Mr. William -- Mr.  
20 Johnson, one of the forensic examiners will testify that he was able  
21 to recover two different sets of chat logs. First, are chat logs  
22 that were recovered from what's call the unallocated space on a

1 computer, and those chat logs, the evidence will show are between PFC  
2 Manning and what the evidence will show to be Julian Assange.

3           The next set of chat logs, Your Honor, also recovered on  
4 this computer were between PFC Manning and Adrian Lamo. And Your  
5 Honor, you'll hear evidence that Adrian Lamo is the individual who  
6 brought PFC Manning to law enforcement's attention. Those logs are -  
7 - the chat logs between Manning and Adrian Lamo, Your Honor, the  
8 evidence will show were found in the allocated space, meaning it was  
9 an actual file on the computer. The chat logs between PFC Manning  
10 and Press Association or Julian Assange were found in unallocated  
11 space. An unallocated space, you'll hear from several witnesses,  
12 specifically the forensic examiners, is a space on the computer  
13 that's not being -- it's not used with, currently being used with  
14 active data. So it might be information that's deleted or it might  
15 never have been used by the computer at that point. The importance  
16 of these chat logs is that there are several admissions made by PFC  
17 Manning in them.

18           First, Your Honor, the evidence will show that PFC Manning  
19 admitted to beginning to help WikiLeaks right after the Thanksgiving  
20 timeframe of 2009. And where you see it says bradass87, the evidence  
21 will show, bradass87 is the user name or the chat log name for PFC  
22 Manning. PFC Manning also made several admissions in the chat log  
23 relating to information that's the subject of this court-martial,



1 information that he allegedly handled. The chat logs between PFC  
2 Manning who is, the evidence will show to be Dawg Network show a  
3 familiarity between the Dawg Network and Press Association, or what  
4 the evidence will show to be Julian Assange. Again, Your Honor,  
5 these are chat logs recovered from the unallocated space, so they  
6 were deleted chat logs.

7 Finally, Your Honor, some of the chat logs the evidence  
8 will show PFC Manning indicated what he thought WikiLeaks was.

9 Also recovered from PFC Manning's computer, Your Honor, is  
10 what forensic examiners will refer to as mounting data. Mounting  
11 data, Your Honor, is simply data that's created by the personal  
12 laptop when a CD is inserted. Your Honor, on the screen now is the  
13 mounting data recovered from the deleted space or the unallocated  
14 space on PFC Manning's personal computer. And specifically, Your  
15 Honor, the evidence will show that the numeric there, so as you see  
16 at the top, 1-0-0-2-1-5\_0-6-2-1, you'll hear testimony that that is  
17 the way that the Roxio CD burning program on PFC Manning's SIPRNET  
18 laptops date/time stamps a CD when it's burned. What this mounting  
19 data did was it captured essentially the name of the CD, and the  
20 evidence will show that it also captured the files on the CD as well.  
21 As you can see, Your Honor, the evidence will show that about the  
22 sixth line down, the document that is the subject of Specification 14  
23 of Charge II is there. Also collected from PFC Manning's CHU or

1 personal living space, Your Honor, were two documents of interest.  
2 The first was a PowerPoint brief prepared by PFC Manning or what the  
3 evidence will show to be PFC Manning at Advanced Individual Training  
4 at Fort Huachuca. Mr. Brian Madrid, one of the platoon sergeants for  
5 PFC Manning, will testify that PFC Manning was required to give this  
6 OPSEC brief as corrective training. Additionally, Your Honor,  
7 forensic examiners were able to recover contact information for  
8 Julian Assange, and the evidence will show that the metadata related  
9 to that file shows that the file was created on 29 November 2009.  
10 Your Honor, on the screen is the actual content of the text file.

11 CID also collected the SD card, Your Honor. As I mentioned  
12 earlier, Your Honor, an SD card is simply a portable memory device  
13 used for cameras and things like that. That SD card was collected  
14 from PFC Manning's aunt's house in Potomac, Maryland. And the  
15 evidence will show that on that SD card were two complete databases.  
16 The Combined Information and Data Network Exchange, CIDNE Iraq SIGACT  
17 database and the CIDNE Afghanistan SIGACT database. The evidence  
18 will show that the metadata related to those files shows that the  
19 Afghan database was created on January 8th 2010. The metadata  
20 related to the Iraq database was created on 5 January 2010. And  
21 finally, Your Honor, you'll see there a text file was also on this SD  
22 card entitled "Read Me" created on 9 January 2010. In that text  
23 file, Your Honor, was a note. This is the actual content of that

1 text file, Your Honor. On the SD card as well were pictures of PFC  
2 Manning, which the evidence will show that this was PFC Manning's  
3 portable electronic device.

4 FBI and CID agents also collected a computer from  
5 Brookhaven National Laboratory in New York. The evidence will show  
6 that this work computer belonged to an individual named Jason Katz.  
7 The evidence will also show that on this work computer was a forensic  
8 match of the video charged in Specification 11 of Charge II, the BE  
9 22 PAX.zip video was on this computer. And forensic examiners will  
10 testify that that video was on the computer on 15 December 2009. CID  
11 agents also collected CENTCOM SIPRNET SharePoint logs. Again, Your  
12 Honor, the SharePoint logs are simply logs related to the SharePoint  
13 server at CENTCOM where the staff and the employees of CENTCOM posted  
14 documents for collaboration. These logs show the downloading of 334  
15 files on 10 April 2010. Those files, the evidence will show, related  
16 to an investigation into an air strike in Farah province in  
17 Afghanistan in May 2009. The evidence will also show that none of  
18 the videos related to this investigation were downloaded on that day.  
19 CID agents also collected a NIPRNET computer from the supply annex.  
20 As I stated earlier, Your Honor, that computer was collected because  
21 PFC Manning was moved there in early May 2010. The evidence will  
22 show that that computer was used to download the United States Forces  
23 Iraq Global Address List. And the evidence will show that the

1 computer was used to essentially create two different files, one file  
2 contained the emails of 74,000 Servicemembers in Iraq, the other file  
3 contained the personal information of approximately 74,000  
4 Servicemembers in Iraq.

5 Now, Your Honor, on the screen is a snippet of the personal  
6 information file. The government has redacted or taken off the left-  
7 side, Your Honor, which are the last names of the individuals. In  
8 the full file, Your Honor, though, the evidence will show that the  
9 full names are there.

10 PFC Manning also signed a number of non-disclosure  
11 agreements throughout his time in the Army. In these non-disclosure  
12 agreements the evidence will show PFC Manning acknowledged his  
13 responsibilities upon being -- upon being getting -- being granted  
14 access to classified information. The evidence will show that PFC  
15 Manning acknowledged the special trust and confidence placed in him  
16 by the United States Government. PFC Manning acknowledged the  
17 potential damage that could accrue from the unauthorized disclosure  
18 of classified information. PFC Manning acknowledged that classified  
19 information was the property of the United States Government. And  
20 finally, Your Honor, PFC Manning acknowledged that there were  
21 consequences to unauthorized disclosures. This non-disclosure  
22 agreement, Your Honor, has already been admitted as Prosecution  
23 Exhibit 8. Specifically, Your Honor, the government notes that what

1 the evidence will show that PFC Manning acknowledged that he could be  
2 liable for criminal offenses under 18 United States Code 641 and 793.  
3 PFC Manning signed that document on 17 September 2008. Your Honor,  
4 the evidence will show that WikiLeaks posted a most wanted list in  
5 2009, and specifically, Your Honor, the evidence will show that PFC  
6 Manning made searches from the SIPRNET computer related to  
7 information that was also found on the most wanted list.  
8 Specifically, Your Honor, on 28 November 2009, the evidence will show  
9 that the .40 SIPRNET computer searched for retention of interrogation  
10 videos. And, Your Honor, you haven't seen this yet, but this is what  
11 the evidence will show to be a summary of the Intelink searches made  
12 throughout PFC Manning's deployment. This is an excerpt of that  
13 search log. The most wanted list in 2009 also sought information  
14 very similar.

15 Your Honor, the government also would like to highlight a  
16 few key witnesses you'll hear. Several of these witnesses you'll  
17 hear throughout the trial. First, Special Agent David Shaver led a  
18 team of forensic examiners from the Digital Forensics and Research  
19 Branch of the Army Computer Crimes Investigative Unit. Special Agent  
20 Shaver, the evidence will show, is a leader in his field. They  
21 conducted most if not all of the forensic examinations in this case,  
22 as well as the examination of audit logs. Mr. Johnson was one of his  
23 forensic examiners. He'll testify regarding his examination of the

1 personal laptop computer of PFC Manning as well as the external hard  
2 drive. Special Agent Williamson will testify regarding his  
3 examination of the supply annex NIPRNET computer. You'll hear from  
4 one of PFC Manning's instructors at AIT, Mr. Moul. Mr. Moul is a  
5 retired all-source intelligence analyst, and he'll testify that he  
6 provided training during AIT on classification of documents, handling  
7 of classified material, information security and operations security,  
8 as well as training on the enemy's use of the Internet. Your Honor,  
9 this is just -- the evidence will show one of the slides PFC Manning  
10 was provided training on. Your Honor, you'll also hear from  
11 government officials from various agencies, including the Department  
12 of Defense, Department of State and other government organizations,  
13 and these witnesses will testify regarding the nature and content of  
14 the charged information. You'll hear from original classification  
15 authorities from several of these agencies as well, and they'll  
16 discuss the classification of documents they reviewed. You'll also  
17 hear from Mr. Lewis. Mr. Lewis, Your Honor, the evidence will show  
18 is a Department of Defense Counter Intelligence expert with  
19 approximately 30 years of experience. He'll testify that there is a  
20 market for government information and specifically a market for  
21 classified information. And he'll also testify that that market is  
22 defined by thousands of dollars for just a handful of documents.  
23 Your Honor, you'll also hear from several of the unit witnesses, so

1 witnesses that were in the S-2 section who worked with PFC Manning.  
2 They'll discuss the Iraq deployment, they'll testify regarding PFC  
3 Manning's work product and his skill-sets, and they'll discuss and  
4 testify regarding the duties of an All-Source Intelligence Analyst.

5           During trial, Your Honor, the government's attempt to  
6 attempt to simplify complicated evidence by preventing -- by  
7 presenting evidence -- events chronologically. What the evidence  
8 will show is that PFC Manning arrived in Iraq in early November 2009  
9 or late October 2009, began working regularly in the SCIF in mid-  
10 November 2009, and in late November 2009, less than two weeks after  
11 beginning work, PFC Manning began helping WikiLeaks. Again, Your  
12 Honor, this is an excerpt -- the evidence will show this is an  
13 excerpt, that this is an excerpt in the chat logs with Adrian Lamo.  
14 The evidence will show that the first transmission of classified  
15 information PFC Manning made was a transmission in late November  
16 2009, and that transmission was the video charged in Specification 11  
17 of Charge II. The evidence will show that this video was located on  
18 the CENTCOM SIPRNET SharePoint site under subfolders for CENTCOM  
19 Legal/Investigations and Farah. The investigation will show that  
20 this video was password protected, meaning that it could not be  
21 opened without the password. You'll hear evidence from CID agents  
22 who traveled to CENTCOM in order to collect the password. You'll  
23 also hear evidence, Your Honor, that this same video, a forensic

1 duplicate of this video was on the work computer of Jason Katz on 15  
2 December 2009. This is also an excerpt from the chat logs with  
3 Adrian Lamo, Your Honor, and the evidence will show that PFC Manning  
4 admitted to transmitting the Gharani air strike video. This excerpt  
5 also shows, Your Honor, that PFC Manning acknowledged that the video  
6 was decrypted -- or encrypted. Jason Katz, Your Honor, you'll hear  
7 in the evidence, was a Department of Energy employee at Brookhaven  
8 National Laboratory in New York. And forensic examiners will testify  
9 that password cracking software was found on the same computer.  
10 Additionally, Your Honor, the evidence will show that on 8 January  
11 2010 WikiLeaks Tweeted that they had a copy of an encrypted video.  
12 This is evidence from the WikiLeaks Twitter feed, Your Honor, that  
13 will be presented at trial. As you can see, Your Honor, the Tweet is  
14 dated 8 January 2010. The evidence will show also, Your Honor, that  
15 if you click on the link there, that links to an article about the  
16 Farah or Gharani air strike. After the transmission of this single  
17 video, Your Honor, the evidence will show that PFC Manning moved on  
18 to much larger database, and specifically he moved on to the  
19 information charged in Specifications 4 through 7 of Charge II. The  
20 evidence will show that in early January 2010 PFC Manning downloaded  
21 the entire Combined Information and Data Network Exchange Iraq  
22 database. The evidence will show that he accessed that database  
23 locally. The evidence will also show that in this same timeframe,



1 early January, he downloaded the CIDNE Afghanistan database. And the  
2 evidence will show that in order to access that database he had to go  
3 through a server at CENTCOM. You'll hear testimony, Your Honor, that  
4 both these CIDNE databases were only available on classified  
5 networks. In other words, Your Honor, the evidence will show that  
6 PFC Manning had to use his SIPRNET access to access these documents.  
7 You'll hear testimony that the reports identified in Specification 5  
8 and Specification 7 were classified, and you'll hear testimony  
9 regarding the value of this information. Your Honor, you'll also  
10 hear testimony from the forensic examiners relating to their  
11 examination of the SD card. And those examiners will testify that  
12 the metadata related to those files shows that CIDNE Iraq was  
13 packaged on 5 January, and CIDNE Afghanistan was packaged on 8  
14 January. Again, Your Honor, that's the metadata file on the SD card.

15           It's also helpful at this time, Your Honor, to go through  
16 sort of a timeline of early events. The evidence will show, as I  
17 stated earlier, that PFC Manning arrived in Iraq in November 2009.  
18 On 21 January 2010, so approximately two weeks after the files  
19 related to the CIDNE databases were created, the evidence will show  
20 that PFC Manning left Iraq for R and R. On the 24th of January,  
21 2010, the evidence will show that PFC Manning arrived in the D.C.  
22 area. And on the 25th of January 2010, the evidence will show that  
23 PFC Manning cleared his computer, he wiped his computer of all of the

1 data and he reinstalled the operating system on his Apple laptop.  
2 You'll hear testimony, Your Honor, from the forensic examiners who  
3 will discuss what wiping is, but essentially no information on the  
4 personal computer can be recovered prior to 25 January 2010. On the  
5 26th of January 2010, the evidence will show that PFC Manning left  
6 D.C. for Boston. And on the 31st of January 2010, the evidence will  
7 show that while in Boston PFC Manning cleared his computer of all the  
8 data in the unallocated or free space. The evidence will show, Your  
9 Honor, that that means that no data can be recovered from the deleted  
10 space prior to 31 January 2010. Around the 1st of February, 2010,  
11 PFC Manning returned to D.C., and on the 11th of February, 2010, the  
12 evidence will show that PFC Manning returned to the Iraq theater. In  
13 that same day, Your Honor, the evidence will show that PFC Manning  
14 created an encrypted file on his personal computer, a strong box.DMG.  
15 Approximately three days later, Your Honor, the evidence will show  
16 that PFC Manning returned to work and immediately began harvesting  
17 government information. This first day back on the SCIF, Your Honor,  
18 the evidence will show PFC Manning began collecting information  
19 relating to Iceland. The evidence will show that WikiLeaks at this  
20 time was based in Iceland, and specifically Julian Assange. The  
21 evidence will also show that on the 15th of February 2010, PFC  
22 Manning burned the document charged in Specification 14 in Charge II,  
23 the diplomatic cable Reykjavik 13. It is the volume mounting data,

1 Your Honor, so evidence or data recovered from unallocated space on  
2 PFC Manning's personal computer. As stated earlier, Your Honor,  
3 Reykjavik 13 was on a disc inserted into PFC Manning's computer, as  
4 well as other information related to Iceland. In that same  
5 timeframe, Your Honor, the evidence will show that PFC Manning also  
6 on that same disc that contained Reykjavik 13 was the video charged  
7 in Specification 2 of Charge II, commonly referred to as the Apache  
8 Video. This video, Your Honor, the evidence will show was located on  
9 the brigade's SIPRNET Share drive under the SJA folder. You'll hear  
10 from a CENTCOM FOIA officer who will testify that the video was not  
11 released when CENTCOM released the investigation through FOIA related  
12 to this video. You'll also hear testimony, Your Honor, that when the  
13 Apache video, so, when the 12 July 2007, video was initially released  
14 by WikiLeaks, it was released as an edited version, and the evidence  
15 will show that PFC Manning was part of this editing process. This  
16 email, Your Honor, was recovered from PFC Manning's personal  
17 computer. You'll also hear testimony, Your Honor, from an Army  
18 Aviator who will testify and explain how the video could be useful to  
19 foreign adversaries.

20 Your Honor, the evidence will show that PFC Manning  
21 conducted research on WikiLeaks throughout the deployment. His first  
22 search for WikiLeaks on the SIPRNET, the evidence will show was 1  
23 December 2009. The evidence will show that prior to and after 15

1 February 2010, PFC Manning researched WikiLeaks extensively on the  
2 SIPRNET. And the Intelink log activity, Your Honor, that will be  
3 presented at trial will show that PFC Manning conducted more than 100  
4 searches for WikiLeaks on the SIPRNET. The evidence will also show,  
5 Your Honor, that on 1 December 2009 PFC Manning first accessed the  
6 document charged in Specification 15 of Charge II, the ACIC document.  
7 Your Honor, there's a screen shot again of the excerpts from the  
8 SIPRNET search log on Intelink. As you can see, on 1 December the  
9 .40 computer searched for the word WikiLeaks. That search, Your  
10 Honor, led to this report. Your Honor, this is an excerpt of the  
11 document charged in Specification 15 of Charge II. This report, Your  
12 Honor, made several key judgments, but specifically it stated that  
13 recent unauthorized release of DoD sensitive and classified documents  
14 provide foreign intelligence services, foreign terrorist groups,  
15 insurgents and other foreign adversaries with potential actual  
16 information for targeting U.S. Forces.

17 In short, Your Honor, the evidence will show that this  
18 document alerted readers that WikiLeaks was a source of intelligence  
19 for adversaries. The evidence will show that this document had not  
20 been released publicly. It was only available to individuals with  
21 access to the SIPRNET or higher. And initially, the evidence will  
22 show that it was marked top and bottom with classification as you saw  
23 earlier. In addition to the document charged in Specification 15 of

1 Charge II, the ACIC document, PFC Manning found a number of other  
2 documents relating to WikiLeaks in the mid-February timeframe. The  
3 evidence will show, Your Honor, that this is an excerpt from the C3  
4 document. That document as well as an IR -- IIR, Intelligence  
5 Information Report relating to WikiLeaks was on a CD inserted into  
6 PFC Manning's computer around 15 February of 2010. Again, Your  
7 Honor, this is an excerpt of the mounting data recovered from PFC  
8 Manning's personal computer. After this transmission of several  
9 documents on 15 February, 2010, the evidence will show that PFC  
10 Manning moved on to again or went back to larger databases and,  
11 specifically, Your Honor, the information charged in Specifications 8  
12 and 9 of Charge II. On 5 March 2010, the evidence will show that PFC  
13 Manning attempted to download the JTF-GTMO detainee assessment  
14 database manually. And what I mean by manually, Your Honor, is that  
15 clicking and saving to a computer. Special Agent Shaver will explain  
16 -- will testify using the Intelink logs how he can tell the activity.  
17 The evidence will show that PFC Manning stopped after downloading  
18 approximately 400 detainee assessments on 5 March. But on 7 March  
19 the evidence will show that PFC Manning went back and he downloaded  
20 the entire detainee assessment database, more than 750 records. The  
21 evidence will show that PFC Manning used a program named WGet to  
22 automate this process. The chat logs with Julian Assange, Your  
23 Honor, the evidence will show discussed this information. This

1 excerpt from the chat logs, Your Honor, on 7 March, the evidence will  
2 show PFC Manning asked Julian Assange how valuable these memos are.  
3 And by the 8th of March, Your Honor, the evidence will show that PFC  
4 Manning already had a CSV that organized the info as much as  
5 possible. Again, this is an excerpt from the recovered chat logs on  
6 PFC Manning's personal computer. You'll hear testimony, Your Honor,  
7 that each detainee assessment was marked on the top and bottom with  
8 classification, and you'll hear testimony from the Intelligence  
9 Analyst who maintained this database and wrote many of the  
10 assessments, and he'll testify that the detainee assessments were  
11 only available on the SIPRNET and higher. And that these assessments  
12 had not been released to the public. In this same timeframe, Your  
13 Honor, and I'm now referring to Specification 2 of Charge III, the  
14 evidence will show that PFC Manning -- I'm sorry, excuse me. In this  
15 timeframe, Your Honor, is the first known use of the program named  
16 WGet. You'll hear testimony, Your Honor, that WGet is free software  
17 available on the Internet and it's used to rapidly download  
18 information from web servers. You'll also hear testimony that  
19 acceptable use policies prohibited the addition of freeware or free  
20 software and executables on government information systems. As you  
21 can see, Your Honor, that is an excerpt of a regulation you've taken  
22 judicial notice of, AR 25-2. That's an excerpt of an acceptable use  
23 policy. In the same timeframe, Your Honor, the evidence will show

1 that PFC Manning, with the help of what the evidence will be to show  
2 Julian Assange attempted to devise a way to browse the SIPRNET  
3 anonymously. On the screen, Your Honor, is an excerpt of a chat log.  
4 Again, these are the chat logs recovered from PFC Manning's personal  
5 computer. And these chat logs, the evidence will show, PFC Manning  
6 asked, "Any good at LM hash cracking". LM, the evidence will show,  
7 stands for LAN manager. Press Association responds, "We have rainbow  
8 tables for LM". Your Honor, the evidence will show that an LM hash  
9 is essentially the way a Windows computer stores passwords on that  
10 computer. It doesn't store the passwords as, you know, one, two,  
11 three, four, five. It stores it as hash -- stores it as -- stores it  
12 as a hash value. Special Agent Shaver will testify that the hash  
13 value, the second line from the bottom, is a system file on the  
14 SIPRNET computers of PFC Manning, a system file related to the  
15 password for the administrator account. Hash cracking, Your Honor,  
16 is essentially reverse engineering the password. In late March 2010  
17 -- In early May 2010, Your Honor, early April 2010, PFC Manning again  
18 went back to larger databases. In this case, Your Honor, the  
19 evidence will show that PFC Manning used WGet to systematically  
20 harvest more than 250,000 Department of State diplomatic cables. The  
21 evidence will show that 251,287 purported Department of State cables  
22 were released by WikiLeaks. This activity occurred between 28 March  
23 and early April 2010, and Special Agent Shaver will testify regarding

1 his examination of the firewall logs related to the Department of  
2 State and he'll testify that between PFC Manning's SIPRNET computers  
3 and the firewall logs were more than 700,000 connections in this  
4 timeframe. 250,000 diplomatic cables, Your Honor, that's 25,000 over  
5 the -- cables a day, more than a thousand cables an hour. And the  
6 evidence will show that this process was automated. The evidence  
7 will show that WGet and programs like it were prohibited by the  
8 acceptable use policy signed by every Servicemember who has access to  
9 a government information system. And what WGet does is it bypasses  
10 the normal mechanism for access to these cables. Click, open, save.  
11 Evidence will show that WGet acted as a technical boost for  
12 downloading large amounts of information from web servers. The  
13 evidence will show that literally the day after this download of  
14 information was completed, this initial download of 250,000 cables,  
15 PFC Manning went back to the CENTCOM SIPRNET SharePoint site. The  
16 evidence will show that the logs from this SIPRNET SharePoint site  
17 show the entire 15-6 related to the Gharani air strike were  
18 downloaded, more than 300 -- or approximately 334 records. Again,  
19 Your Honor, these logs also show that none of the videos related to  
20 this air strike were downloaded on the same day and Special Agent  
21 Shaver will testify regarding the log evidence. Again, Your Honor,  
22 this is an excerpt from the chat logs between PFC Manning and Adrian  
23 Lamo. You'll hear testimony, Your Honor, that these documents were



1 located in a folder devoted to the investigation. The investigation  
2 was only available on the SIPRNET. These documents had not been  
3 released publicly and they were marked with classifications. On May  
4 4, Your Honor, the evidence will show that PFC Manning was having  
5 trouble with WGet on his computer, and so the evidence will show that  
6 PFC Manning went back to the NIPRNET, downloaded WGet again, and  
7 moved it from his NIPRNET computer to the SIPRNET computer in the  
8 SCIF. On this same day, Your Honor, the evidence will show that PFC  
9 Manning used WGet again to download an additional approximate 11,000  
10 cables again from the Department of State Net-Centric Diplomacy  
11 Database. This is the Excel spread sheet I showed you earlier, Your  
12 Honor, a backup that was found on PFC Manning's .22 computer. Again,  
13 Your Honor, 251,287 cables were released by WikiLeaks, purported  
14 cables released by WikiLeaks. These are the next cables in line.  
15 And that file, Your Honor, that file of Department of State cables  
16 the evidence will show was burned onto a CD in the SIPRNET and moved  
17 to PFC Manning's personal computer. Again, this is the mounting data  
18 recovered from PFC Manning's personal computer.

19           Shortly after this download, Your Honor, the evidence will  
20 show PFC Manning was moved to the supply annex from the SCIF. At  
21 this point, Your Honor, the evidence will show that PFC Manning did  
22 not have access to the SIPRNET. He worked for the supply sergeant,  
23 Staff Sergeant Peter Bigelow, and on 7 May, Your Honor, a Tweet from

1 WikiLeaks sought more information. That Tweet, Your Honor, released  
2 7 May asked for a list of as many .mil email addresses as possible.  
3 That Tweet was released 7 May 2010. Around 11 May 2010, the evidence  
4 will show that PFC Manning extracted the email addresses and personal  
5 information of more than 74,000 Servicemembers in Iraq. The names,  
6 email addresses, the ranks, the positions of everyone in the United  
7 States Forces Iraq Global Address List. Special Agent Williamson  
8 will testify that between the two files extracted from the GAL are  
9 more than 2,000 pages of printed material. Again, Your Honor, on the  
10 screen is an excerpt from one of the files containing personal  
11 information, and the real file, Your Honor, the evidence will show  
12 contains the entire name. The government has redacted the left.  
13 These two files, Your Honor, one file containing email addresses and  
14 the other file containing personal information, were both moved to  
15 PFC Manning's computer. You'll also hear testimony from the examiner  
16 who examined PFC Manning's computer and you'll also hear testimony  
17 relating to the value of this information. Mr. Lewis, a Counter  
18 Intelligence expert, will testify that by providing this type of  
19 personal information you are providing foreign intelligence services  
20 with essentially a phone book. And Chief Rouillard will testify that  
21 adversaries who spearphish, so essentially spearphishing is the act  
22 of using a targeted email to obtain financial information, other  
23 personal information from individuals, use these types of lists to

1 target individuals. You will also hear testimony from an information  
2 assurance expert who will discuss the provisions of regulation and  
3 appropriate uses of government information systems.

4           Finally, Your Honor, the evidence will show that the  
5 accused knowingly gave intelligence to the enemy. As discussed  
6 earlier, Your Honor, the evidence will show that PFC Manning searched  
7 for WikiLeaks more than 100 times on the SIPRNET. The evidence will  
8 show that he understood the nature of the organization. The search  
9 he made on 1 December 2009, the search for WikiLeaks, the evidence  
10 will show, led him to this document in particular, the documents  
11 charged in Specification 15 of Charge II. The evidence will show  
12 that PFC Manning's training warned him repeatedly of the enemy's use  
13 of the Internet writ large, and PFC Manning's research warned him of  
14 the use of WikiLeaks. And he was right. You will hear that enemies  
15 of the United States reviewed information provided by PFC Manning.  
16 You will hear evidence that during the raid that killed Osama bin  
17 Laden government officials collected several items of digital media.  
18 On one of these items of digital media was the entire CIDNE  
19 Afghanistan database as released by WikiLeaks as well as State  
20 Department information. The evidence will show that bin Laden asked  
21 for this information and was in turn provided the CIDNE reporters by  
22 another member of Al Qaeda. Your Honor, the evidence will show that  
23 PFC Manning worked daily in an area and on systems devoted to the

1 protection of classified information. The evidence will show that  
2 PFC Manning knew the difference between open source information and  
3 information that, if released, could cause damage to national  
4 security or be used to the advantage of another country. And the  
5 evidence will show that if he wasn't sure, he was required to check  
6 with someone. The evidence will show that PFC Manning knew the  
7 dangers of unauthorized disclosure to an organization like WikiLeaks  
8 and he ignored those dangers.

9 At the close of evidence, after PFC Manning's knowledge of  
10 the information is apparent, after the court has a full appreciation  
11 for the forensic evidence revealing PFC Manning's intent, the  
12 government is confident you will find that PFC Manning committed the  
13 remaining offenses as charged. Thank you.

14 MJ: All right. Thank you. Defense, are you going to have an  
15 opening statement or are you going to reserve?

16 CDC[MR. COOMBS]: We'll have an opening statement, Your Honor.  
17 If we could take a, just a 10-minute comfort break, I think I could  
18 do my opening and still get us where we have a lunch.

19 MJ: So you want to do the opening before lunch then?

20 CDC[MR. COOMBS]: Yes, Your Honor.

21 MJ: All right. Any objection?

22 TC[MAJ FEIN]: No, Your Honor.

23 MJ: All right. Ten minutes you said?

1 CDC[MR. COOMBS]: Yes, Your Honor.

2 MJ: All right. Court is in recess until 10 minutes after 12.

3 **[The court-martial recessed at 1204, 3 June 2013.]**

4 **[The court-martial was called to order at 1218, 3 June 2013.]**

5 MJ: Court is called to order. Let the record reflect all  
6 parties present when the court last recessed are again present in  
7 court. Defense?

8 TC[MAJ FEIN]: Ma'am, if possible, I -- right before defense  
9 goes, the slideshow the United States just used has been marked as  
10 Appellate Exhibit 562.

11 MJ: All right. Thank you.

12 CDC[MR. COOMBS]: Ma'am, it was 24 December 2009. He was 22  
13 years young, in Iraq, his first deployment, his first unit. He was  
14 excited to be in Iraq, and he was excited to help his unit to achieve  
15 his mission, and hopefully make Iraq a safer place. The EFP alert  
16 that went out on that day broke the silence of an otherwise calm  
17 Christmas Eve. EFP had claimed the lives of too many Soldiers. So  
18 when an alert went out, everybody in the TOC and in the SCIF went  
19 into an immediate frenzy to get information. PFC Manning was sent  
20 from the TOC, excuse me the SCIF to the TOC to find out what he could  
21 find out about the EFP. At that point all they really knew was that  
22 an element of the 2/10 was driving down a road that was rarely used  
23 and the lead element had been hit. PFC Manning went to get some

1 additional information but none could be found. They didn't have any  
2 updates, so he went back to the SCIF empty-handed. A few tense  
3 moments later came the welcome news. Despite the lead element being  
4 hit, no Soldiers were killed, no Soldiers were injured. Everyone in  
5 the TOC started celebrating. Everyone in the SCIF started  
6 celebrating. Good news was welcomed on any day, but especially on  
7 Christmas Eve. A few minutes later came some additional news about  
8 that EFP, and the report indicated that as the lead element was  
9 driving down this road there was a civilian car in front of them, and  
10 that civilian car pulled over to the side, as was typical, to allow  
11 the convoy to go by, and they pulled over right in front of where  
12 that EFP was placed. The car had five occupants, two adults and three  
13 children. And that EFP went right through that car to hit that lead  
14 element. All five of the occupants were taken to the hospital, one  
15 died en route. Everyone in the TOC, in the T-SCIF was celebrating.  
16 Everyone was happy. Everyone but PFC Manning. He couldn't  
17 celebrate. He couldn't be happy. The reason why is he couldn't  
18 forget about the life that was lost on that day. He couldn't forget  
19 about the lives and the family that was impacted on that Christmas  
20 Eve. And from that moment forward PFC Manning started a struggle.  
21           You see, PFC Manning is not a typical Soldier. The  
22 evidence will show that when he deployed to Iraq he had custom dog

1 tags, ID tags that he had made, and on the back of those tags read  
2 "Humanist".

3 MJ: Read?

4 CDC[MR. COOMBS]: Humanist. He was a humanist, and a humanist  
5 was the religious belief that he ascribed to, and those values are  
6 placing people first, placing value on human life. In the months and  
7 weeks leading up to the deployment, PFC Manning engaged in an IM chat  
8 conversation with Zachary Antolak, who now has changed his name to  
9 Lauren McNamara, and he's gone from a he to a she. And the two of  
10 them talked about a wide variety of topics. And in that chat  
11 conversation they talked about PFC Manning's humanist beliefs and  
12 they talked about PFC Manning feeling a huge amount of pressure,  
13 pressure to do everything he could to help his unit. He was reading  
14 more into politics, reading more in philosophy, and he indicated the  
15 reason he was doing that was he wanted to be able to give the best  
16 possible information to his command and hopefully save lives. He  
17 talked about feeling a strong desire and a need to do everything he  
18 could to help his unit, and in the hopes of every one of the Soldiers  
19 that deployed with him would come home safely. Every one of the DoD  
20 civilians that worked with them would come home safely. And he also  
21 talked about the fact that he hoped that local nationals, people that  
22 they were trying to help in Iraq, would be able to go home safely.  
23 That was his mindset leading into the deployment.

1 But after that 24 December 2009 incident, things started to  
2 change for him. And he started to struggle. And the evidence will  
3 show the reason why he started to struggle was no longer could he  
4 read SIGACTs or HUMINT reports and just see a name or number and not  
5 think about that family on Christmas Eve who had just pulled over  
6 their car to let the convoy go by. And his struggles were public.  
7 He was struggling not only with the feeling of obligation and duty to  
8 people, but also with the struggle an internal struggle, a very  
9 private struggle with his gender. And this was public for his unit  
10 to see. And his struggles led him to feel that he needed to do  
11 something. That he needed to do something to make a difference in  
12 this world. He needed to do something to help improve what he was  
13 seeing. And so from that moment forward and that was January of 2010,  
14 he started selecting information that he believed the public should  
15 hear and should see. Information that he believed that if the public  
16 saw would make the world a better place, but importantly, information  
17 that he specifically selected that he believed could not be used  
18 against the United States. And information that he believed, if  
19 public, and everyone knew it, could not be used by a foreign nation.

20 The first data set that he selected, ma'am, was the SIGACTs  
21 charged in Specifications 4, 5, 6 and 7 of Charge II. He  
22 specifically knew about specific information about the SIGACTs. He  
23 had dealt with SIGACTs from the time that he got to Fort Drum, but



1 really on a daily basis when he got to Iraq. And he knew that  
2 SIGACTs were low level field reports. These are the reports by the  
3 unit on the ground that documented essentially the five Ws, the who,  
4 what, where, when and why of a particular incident. And he knew that  
5 the SIGACTs were always written for any engagement with the enemy, or  
6 anything that led to the death of a civilian, or the injury of a --  
7 or death of a civilian employee or local national. He knew that the  
8 SIGACTs that he selected were all older than 72 hours. He knew that  
9 SIGACTs were generally considered an historical document, a document  
10 that had accounted for what had happened in the past. He knew that  
11 SIGACTs did not discuss future operations. He knew that SIGACTs did  
12 not contain the names of intelligence sources. When he reviewed the  
13 SIGACTs that he was looking through, he also knew that they  
14 documented activity for the most part that was engaging with the  
15 enemy, so the enemy was aware of what was happening and he knew that.  
16 And he knew that the SIGACTs were really essentially a diary of the  
17 day-to-day activities that was happening. And as he was reading  
18 these SIGACTs now with the benefit or more probably appropriately the  
19 burden of what happened on 24 December 2009, his mindset, he started  
20 to see that this information should be public. The American public  
21 should know what is happening on a day-to-day basis. And as the  
22 government showed, he believed at that point, this is one of the more

1 important documents of our time, lifting the fog of war and showing  
2 the true nature of 21st century asymmetric warfare.

3           He also released the Apache video, and he knew information  
4 specifically about that. That's charged in Specification 2 of Charge  
5 II. First he knew that Specialist Showman, another Intelligence  
6 Analyst was the first to find that video. She found that video in an  
7 archive folder from the previous unit. And she had pulled the video  
8 out and everyone was kind of talking about the ethical implications  
9 of what they were seeing and hearing. He knew that the video  
10 depicted a 2007 attack. He knew that it resulted in the death of two  
11 journalists. And because it resulted in the death of two journalists  
12 it had received worldwide attention. He knew that the organization  
13 Reuters had requested a copy of the video in FOIA because it was  
14 their two journalists that were killed, and they wanted to have that  
15 copy in order to find out what had happened and to insure that it  
16 didn't happen again. He knew that the United States had responded to  
17 that FOIA request almost 2 years later indicating what they could  
18 find and, notably, not the video. He knew that David Finkel, an  
19 author, had written a book called *The Good Soldiers*, and when he read  
20 through David Finkel's account and he talked about this incident  
21 that's depicted in the video, he saw that David Finkel's account and  
22 the actual video were verbatim, that David Finkel was quoting the  
23 Apache air crew. And so at that point he knew that David Finkel had

1 a copy of the video. And when he decided to release this  
2 information, he believed that this information showed how we valued  
3 human life in Iraq. He was troubled by that. And he believed that  
4 if the American public saw it, they too would be troubled and maybe  
5 things would change.

6 He also released the diplomatic cables charged in  
7 Specifications 11 and 12, excuse me 12 and 11 -- 12 and 13 of Charge  
8 II, and what he knew about the diplomatic cables was this: Captain  
9 Lim, his boss, the S-2, had put out the link to the Net-Centric  
10 Diplomacy Database, the diplomatic cables, and said to all analysts  
11 go look at this stuff, start incorporating this into your work  
12 product. And so PFC Manning started looking at the Net-Centric  
13 Diplomatic Database as directed. And as he looked at it, he knew and  
14 found out additional information about it. The cables were called  
15 SIPDIS cables. That was the tag that was placed on them, and SIPDIS  
16 stands for SIPRNET Distribution. The cables were available to anyone  
17 who had SIPRNET access, and he knew that that was at least a million  
18 people. He knew that the cables that were available on the Net-  
19 Centric Diplomacy Database didn't require passwords to log into them.  
20 There were no limitations on what you did or didn't do when you went  
21 there. It was just the entire cables in one area he wanted to look  
22 at. He knew from looking that the cables showed SIPDIS cables from  
23 1966 to 2009. He did some research, and the chats will confirm this,

1 and found a regulation released by the Department of State. And that  
2 regulation much like Army regulations indicated what type of  
3 information could be placed in a SIPDIS cable. And it talked about  
4 that the information that was placed in a SIPDIS cable could only be  
5 that information that could be widely shared with inter agencies  
6 across the government. It could not possess any other more  
7 restrictive covenants. Importantly, it could not have intelligence  
8 sources and it could not have key sensitive information to be in the  
9 SIPDIS cable. He knew because he started to review the Iraq SIPDIS  
10 cables as directed that the information even in those cables tended  
11 to be unclassified. And as he looked at other areas where he was  
12 reviewing things based upon either a geographical area or an area of  
13 interest, he knew that the majority of the cables he came across were  
14 unclassified. And that met with the SIPDIS regulation that he  
15 reviewed. And after reviewing that, he felt that this showed how we  
16 dealt with other countries, how we valued life in other countries.  
17 How we didn't, unfortunately, based upon his youth believed, always  
18 do the right thing by other countries. He also released the Farah  
19 video, the Gharani air strike and the other accompanying documents  
20 charged in Specifications 10 and 11 in Charge II. And he knew some  
21 information with that as well. He knew that it depicted a 2009 air  
22 attack. He knew that that attack resulted in the death of over 150  
23 men, women and children. He knew because of what happened, it

1 received worldwide press. He had seen and reviewed General David  
2 Petraeus interviews talking about what had happened, why it happened  
3 and what the government was trying to do, more importantly the  
4 military, to avoid this from happening again. He knew that there was  
5 a FOIA request for the information and that the Pentagon had promised  
6 to release the video. But the video was not released. At the time  
7 he released this information, he believed it was important because it  
8 showed how something happened and, more importantly, why it should  
9 never have happened in the first place.

10 He next released the DABs, the Detainee Assessment Briefs,  
11 and he knew certain information about the detainee assessment briefs  
12 as well.

13 MJ: And that's specifications?

14 CDC[MR. COOMBS]: Specifications, thank you, ma'am, if you  
15 didn't ask me that, I could have given you that with no problem.  
16 Specifications 8 and 9, ma'am, of Charge II. And what he knew there,  
17 ma'am, was that these were found in an archive folder. That they  
18 were dated mostly from 2002 up to as early or as late, I guess, as  
19 2009. He knew that they didn't have intelligence sources by name,  
20 that they're mostly biographical information. The chat logs with  
21 Zachary Antolak talk about the Guantanamo issue for him and he knew  
22 that the President had promised to close Guantanamo. Looking at the  
23 DABs he knew that most of that information had been released by the

1 Pentagon in 2006 and 2007, the name of the detainees, their ISN  
2 numbers, their detainee numbers, their country of origin, and the --  
3 both the combatant status of review tribunals and the administrative  
4 review boards that contained much of the same information in the  
5 DABs. He also looked at that and he knew what almost everyone else  
6 in America knew as well, that a lot of people there really didn't  
7 need to be there. They were being held there year after year with no  
8 hope of coming into a courtroom. And at the time that he released  
9 this information, even as the government showed, he didn't know for  
10 sure the value of it, I mean, how valuable would this information be,  
11 but based upon that conversation he knew that it might be valuable to  
12 the attorneys that were representing those who were still in  
13 Guantanamo. He also knew that it might be valuable to historians to  
14 be able to put a true account of what our nation did in Guantanamo.

15         Lastly, he selected the documents charged in Specifications  
16 3 and 15, the other government agency documents and the Army  
17 counterintelligence report. And what he knew from these documents  
18 was they didn't possess any intelligence sources. They were largely  
19 based upon publicly available information. The documents did not  
20 contain any intelligence collection. They were simply conversations  
21 being batted around of possibilities. And the reason why these  
22 documents were selected were the topic matter of what was discussed  
23 and how it troubled him. These would be documents on Specification 3

1 as to what our government was talking about and concerned about. At  
2 the time that PFC Manning selected this information that he believes  
3 he was selective. He had access to literally hundreds of millions of  
4 documents as an All-Source Analyst, and these were the documents he  
5 released. And he released these documents because he was hoping to  
6 make the world a better place. He was 22 years old. He was young.  
7 He was a little naive in believing that the information that he  
8 selected could actually make a difference. But he was good  
9 intentioned in that he was selecting information that he hoped would  
10 make a difference. He wasn't selecting information because he was  
11 working for WikiLeaks. He wasn't selecting information because of  
12 some 2009 most wanted list. He was selecting information because he  
13 believed that this information needed to be public. At the time that  
14 he released the information he was concentrating on what the American  
15 public would think about that information, not whether or not the  
16 enemy would get access to it, and he had absolutely no actual  
17 knowledge as to whether or not the enemy would gain access to it.  
18 Young, naive, but good intentioned.

19 Thank you.

20 MJ: All right. I know this is the time now. Would this be an  
21 appropriate time to take a lunch break?

22 TC[MAJ FEIN]: Yes, ma'am.

23 CDC[MR. COOMBS]: Yes, Your Honor.

1 MJ: How long would you like?

2 CDC[MR. COOMBS]: An hour and 15 minutes, Your Honor?

3 TC[MAJ FEIN]: 1345, or that would be a little later than that.

4 MJ: All right. Why don't we just go 1350 and we'll make it

5 like that. How about that?

6 TC[MAJ FEIN]: Yes, ma'am?

7 CDC[MR. COOMBS]: Yes, Your Honor.

8 MJ: Anything else we need to address before we recess the

9 court?

10 CDC[MR. COOMBS]: No, Your Honor.

11 TC[MAJ FEIN]: No, ma'am.

12 MJ: All right. Court is in recess.

13 **[The court-martial recessed at 1241, 3 June 2013.]**

14 **[The court-martial was called to order at 1414, 3 June 2013.]**

15 MJ: Court is called to order. Let the record reflect that all

16 parties present when the court last recessed are again present in

17 court.

18 I note that we are starting a little late. I think some of

19 that is just administrative processing glitches that we sometimes

20 have on the first day of proceedings.

21 Major Fein, is the process a little more streamlined that

22 we'll be able to start on time?

23 TC[MAJ FEIN]: Yes, ma'am.



1 MJ: All right.

2 TC[MAJ FEIN]: It will be streamlined.

3 MJ: Anything we need to address before we begin the merits  
4 phase?

5 CDC[MR. COOMBS]: No, Your Honor.

6 TC[MAJ FEIN]: No, Your Honor.

7 MJ: Call your first witness.

8 ATC[CPT OVERGAARD]: The United States calls Special Agent Thomas  
9 Smith.

10 **SPECIAL AGENT THOMAS SMITH, U.S. Army, was called as a witness for**  
11 **the prosecution, was sworn, and testified as follows:**

12 **DIRECT EXAMINATION**

13 **Questions by the assistant trial counsel [CPT OVERGAARD]:**

14 Q. And you are Special Agent Thomas Smith?

15 A. Yes, ma'am.

16 Q. And what is your rank?

17 A. I am a sergeant first class, ma'am.

18 Q. Where are you currently assigned?

19 A. At the Fort Gordon CID Office, ma'am.

20 Q. What's your position at the Fort Gordon CID Office?

21 A. I'm the senior enlisted case agent as well as the evidence  
22 custodian, ma'am.

1 Q. And what are the responsibilities of the senior enlisted  
2 case agent?

3 A. As the case agent I'm responsible for the daily maintenance  
4 of an investigation to include conducting crime scene examinations,  
5 evidence collection. I'm also responsible for the daily activities  
6 of investigative as far as interviews of witness, subjects, as well  
7 as victims, and also the coordination with SJA and commands, ma'am.

8 Q. And as senior enlisted, does that mean you're the most  
9 senior case agent?

10 A. Yes, ma'am.

11 Q. Most senior enlisted case agent?

12 A. Yes, ma'am.

13 Q. And you mentioned you're an evidence custodian as well?

14 A. Yes, ma'am.

15 Q. What do you do in that position?

16 A. I'm responsible for the intake or processing,  
17 accountability, and then final disposition of the evidence at the end  
18 of the legal proceedings, ma'am.

19 Q. And how many years have you been a CID agent?

20 A. I graduated from CIDSAC, the CID Special Agent Course in  
21 June of 2007, ma'am.

22 Q. Where were you assigned before Fort Gordon?

23 A. I was assigned to the Fort Huachuca CID Office, ma'am.

1 Q. And what did you do there?

2 A. I was a case agent and then transitioned into the senior  
3 enlisted case agent position there as well, ma'am.

4 Q. And were -- When were you there?

5 A. I arrived there in August of 2008 and I departed there in  
6 May/June of 2011, ma'am.

7 Q. Did you deploy during that time?

8 A. I did, ma'am.

9 Q. Where did you go?

10 A. I was -- I went to Iraq. I was the Detachment Sergeant for  
11 the Central Iraq CID Detachment. I was stationed at VBC, ma'am.

12 Q. And that's Camp Victory?

13 A. Yes, Victory Base Complex, ma'am.

14 Q. And do you remember when that was?

15 A. Train-up was in February. I think we were boots on ground  
16 in March of 2010, and then I left in January of 2011, ma'am.

17 Q. And what was your position at Camp Victory?

18 A. I was the Detachment Sergeant, ma'am.

19 Q. What does it mean to be a Detachment Sergeant?

20 A. I was responsible for the general welfare of my Soldiers  
21 over five different FOBs within in the Central Iraqi Area, ma'am.

22 Q. And before -- before you were at Fort Huachuca where were  
23 you assigned?

1       A.    Fort Gordon, ma'am.

2       Q.    And what did you do there?

3       A.    Part of the time I was there as a CID Agent, part of time I

4 was there as MI, ma'am, Military Intelligence.

5       Q.    And so you were a different MOS for part of your time at

6 Fort Gordon?

7       A.    Yes, ma'am.

8       Q.    What was -- What was that MOS?

9       A.    98 Charlie, ma'am.

10      Q.    And what is that?

11      A.    Signals Intelligence Analyst, ma'am.

12      Q.    Is that currently a 35 series?

13      A.    It's a 35 November now, ma'am.

14      Q.    So what does a Signals Intelligence Analyst do?

15      A.    I am responsible for the collection, identification of

16 intelligence, and then in the production of products to the command

17 for action taken -- deemed necessary.

18      Q.    How many years have you been in the Army?

19      A.    Been in the Army just over 13 years, ma'am.

20      Q.    And you said you've been a CID agent for 6 of those years?

21      A.    Yes, ma'am.

22      Q.    And what did you do for the other 7?

23      A.    I was a 98 Charlie, ma'am.

1 Q. What training did you receive to become a CID Specialist?  
2 MJ: What is a 98 Charlie?  
3 WIT: Signals Intelligence Analyst, ma'am.  
4 MJ: I thought you said 30 -- Okay. Got it.  
5 ATC[CPT OVERGAARD]: It was a 98 Charlie, now it is a ----  
6 WIT: 35 November.  
7 ATC[CPT OVERGAARD]: 35 November, yes, ma'am.  
8 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**  
9 Q. So what training did you receive to become a CID Special  
10 Agent?  
11 A. We had 16 weeks at the CIDSAC course, CID Special Agent  
12 Course, at Fort Leonard Wood, Missouri, ma'am.  
13 Q. And is that the CID AIT?  
14 A. Yes, ma'am, it is.  
15 Q. Okay. What did you learn in that course, just in general?  
16 A. In general, the course went over law. It went over crime  
17 scene and the identification processing. It also went over about 2  
18 or 3 days of digital media, a couple days on fraud examinations,  
19 sexual assault investigations, and accumulated in interviews and  
20 interrogations, ma'am.  
21 Q. All right. So you learned about, you said crime scene  
22 processing and evidence collection?  
23 A. Yes, ma'am.

1 Q. What other specialized training have you had as a CID  
2 agent?

3 A. I've attended the Hostage Negotiators Course. I've  
4 attended the Special Agent Laboratory Technician training at Fort  
5 Gillem, with the U.S. Army Criminal Lab. I've attended the EMC  
6 Squared course.

7 Q. And what's that?

8 A. The Evidence Maintenance Custodian's Course. I've also  
9 attended multiple courses on post blast crime scenes. And several  
10 different courses on interview interrogations, ma'am.

11 Q. Did any of the training focus specifically on evidence  
12 collection?

13 A. It did, ma'am.

14 Q. What percentage of it?

15 A. Of the training that we received during the CIDSAC course,  
16 there's a week dedicated to nothing but crime scenes, it's called  
17 Crime Scene Hallway in which we do nothing but process crime scenes  
18 to include the collection of evidence.

19 Then with the post blast courses, part of the training at  
20 the end is we did recovery, data identification and recovery and  
21 collection of the evidence. And then the EMC Squared Course doesn't  
22 talk about the collection of the evidence in the field, but it's a

1 couple days course pertaining to the proper maintenance of the  
2 evidence once it's brought into the evidence room, ma'am.

3 Q. And how about specifically the collection of digital  
4 evidence?

5 A. Digital evidence is covered. It's about a 2 or 3 day  
6 course that's taught within the CIDSAC course, ma'am.

7 Q. And is there any other -- well, is there any other unit  
8 level training for the collection of digital evidence?

9 A. On occasion the digital forensic examiners which are at the  
10 battalion level will come into the field and conduct training with  
11 us, and they'll also send out bulletins as new techniques or new  
12 methods are learned to keep us updated in the field, ma'am.

13 Q. And what did you learn about the collection of digital  
14 evidence?

15 A. The training basically comes down to photographing it in  
16 place, hit the shift key, photograph -- if anything's on the screen,  
17 photograph the cables and connections leading into the computer, pull  
18 those, and then conduct a hard shutdown of the system, ma'am.

19 Q. Why do you do a hard shutdown?

20 A. Because it has been identified that there is programs out  
21 there to where if you begin to do a soft shutdown of the system it  
22 will actually start to wipe media and programs off the system, ma'am.

1 MJ: What is the difference between a hard shutdown and a soft  
2 shutdown?

3 WIT: The soft shutdown, ma'am, is when you go into the  
4 system and tell it to turn itself off, like we do a restart on a  
5 computer on a nightly basis, ma'am. A hard shutdown is where you're  
6 actually pulling the power on it and it immediately shuts it down,  
7 ma'am.

8 MJ: Thank you.

9 [Examination of the witness continued.]

10 Q. You also mentioned processing a digital crime scene. When  
11 did you cover that?

12 A. That is all part of the training during the 2 or 3 days at  
13 CIDSAC, ma'am.

14 Q. So how do you -- will you walk us through how you process  
15 the digital crime scene?

16 A. First thing to do, and it doesn't deviate any more than any  
17 other crime scene except the evidence that you're collecting and how  
18 you go about collecting it, but you start out with photographing the  
19 crime scene. After you photograph the crime scene you conduct a pen  
20 and ink sketch of the crime -- of the scene, and then you begin your  
21 search of the scene looking for evidence within the crime scene,  
22 ma'am. As you come across digital media, it's going to be



1 photographed in place, marked on the sketch on where it's being  
2 collected from and then collected, ma'am.

3 Q. Is there any special way to store that digital evidence?

4 A. It's recommended that it's placed inside a dry -- a dry  
5 element to prevent dust and other elements getting to it, as well as  
6 water. So the best practice is to keep it dry and clean, ma'am.

7 Q. Do you have any degrees that are relevant to your job as a  
8 CID Agent?

9 A. I have a bachelor's in psychology and criminal justice, and  
10 I'm about one class away from my master's degree in criminal justice  
11 with an emphasis in law and forensic science, ma'am.

12 Q. And how many cases have you conducted investigative  
13 activity as a CID Agent?

14 A. Investigative activity, I've probably been a part of  
15 approximately 250 cases, ma'am.

16 Q. And how about as the primary, the lead agent?

17 A. Lead agent or conducting significant investigative  
18 activity, approximately 150, ma'am.

19 Q. How about how many computer crime cases have you worked as  
20 a CID agent?

21 A. Approximately ten, ma'am.

22 Q. Okay. And how did you first become involved with this  
23 particular case?

1       A.    While we were there at VBC, our commander received a  
2 request for an investigation, or an RFI from CID command. He brought  
3 us around the table. He briefed us as far as what was contained  
4 within the RFI and we broke it down into a three-man element that was  
5 going to go to VBC, ma'am.

6       Q.    Okay. And do you remember when you received this  
7 information?

8       A.    The 27th of May, 2010, I believe, ma'am.

9       Q.    Why did your office get it?

10      A.    Because FOB Hammer was within our AO, ma'am.

11      Q.    And were you personally tasked?

12      A.    I was, ma'am.

13      Q.    You were part of the three-man team that you talked about?

14      A.    Yes, ma'am.

15      Q.    And what was your -- what was your role to be on that  
16 three-man team?

17      A.    I was being sent out there to conduct the crime scene as  
18 well as the evidence collection while we were there, ma'am.

19      Q.    Why were you chosen?

20      A.    I was the senior enlisted. I had a lot more crime scene  
21 experience than a lot of the other agents in the office, and since I  
22 had already taken the soft course then I was chosen for that, ma'am.

23      Q.    Who else was assigned to that team?

1           A.   Agent Lisciandri, Agent Toni Graham. There was a CI,  
2 Counter Intelligence agent that was assigned to the team, and myself,  
3 ma'am.

4           Q.   Does your background as a 35 series, did that have anything  
5 to do with you being assigned to the team?

6           A.   It was partially one of the reasons that I was sent out  
7 there was also to conduct the interview of PFC Manning initially, and  
8 that was one of the reasons that I was sent out there was that I  
9 might be able to relate to him.

10          Q.   Because you were an Intel Analyst?

11          A.   Correct, ma'am.

12          Q.   Who was in charge of that team?

13          A.   That would have been Agent Toni Graham, ma'am.

14          Q.   And what were your ----

15          MJ:   Toni what?

16          WIT:  Toni Graham, ma'am.

17          MJ:   Graham, thank you.

18          WIT:  Yes, ma'am.

19 [Examination of the witness continued.]

20          Q.   What were the first actions that your team took when  
21 getting assigned to this case?

22          A.   Once we were assigned to the case, Agent Graham pulled all  
23 the information needed in order to go in front of the magistrate to

1 get a search and seizure authorization. I myself, outside of packing  
2 my own gear obviously, also began packing the material that we were  
3 going to need once we hit ground as far as the crime scene to include  
4 cameras, paper bags and other items, ma'am.

5 Q. When did you go, when did you leave for this assignment?

6 A. We left on the 27th of May, 2010, ma'am.

7 Q. And where were you going?

8 A. From VBC to FOB Hammer, ma'am.

9 Q. Where was that?

10 A. Ma'am, I don't remember.

11 Q. Okay.

12 A. I know it was on the other side of the river out in the  
13 middle of nowhere.

14 Q. How did you get there?

15 A. We took helo flights out there, ma'am.

16 Q. Okay. And you said -- you mentioned you gathered supplies  
17 for the mission. What did you gather specifically?

18 A. Cameras, paper bags. We gathered tape measures, paper, pen  
19 and our computers so that we'd be able to work once we hit ground,  
20 ma'am.

21 Q. And you said Agent Graham, she -- she went and got search  
22 authorizations?

23 A. Yes, ma'am.

1 Q. Do you know what you were authorized to search once you hit  
2 the ground?

3 A. I knew we were authorized to search the SCIF that PFC  
4 Manning was assigned to as well as his CHU, ma'am.

5 Q. And when did you get to FOB Hammer?

6 A. The evening of 27 May 2010, ma'am.

7 Q. What did you do right when you arrived at FOB Hammer?

8 A. The first thing we did was we debriefed part of PFC  
9 Manning's chain of command.

10 Q. Then what did you do after that?

11 A. We dropped our load and our equipment inside the battalion  
12 S-2's office and we went into the SCIF and we started conducting  
13 canvass interviews.

14 Q. Why did you go to the SCIF?

15 A. Because we were told that the team that PFC Manning worked  
16 with or the shift that he worked with was currently in the SCIF  
17 working.

18 Q. And who all on your investigative team went to the SCIF?

19 A. It was myself and Agent Toni Graham, ma'am.

20 Q. And you said you were doing canvass interviews?

21 A. Yes, ma'am.

22 Q. Who was doing those interviews?

23 A. Myself and Toni Graham, ma'am.

1 Q. Was there any time that you broke off from doing those  
2 interviews?

3 A. After we completed the canvassing interviews, at that point  
4 we switched over and started conducting the crime scene exam of the  
5 SCIF, ma'am.

6 Q. How did you conduct the crime scene investigation of the  
7 SCIF?

8 A. Due to the nature of it being a SCIF, we had them cover up  
9 some of the material that was on the wall that was Secret in nature,  
10 and then after they semi-sanitized the SCIF we had them leave out of  
11 the SCIF and at that point we started photographing, sketching and  
12 documenting the scene, ma'am.

13 Q. When you say sanitize, what do you mean?

14 A. There was some stuff up on the wall that was Secret in  
15 nature, so we had them put up a, I believe it was a blanket or  
16 something over it. There was one or two charts that were on the wall  
17 that were Secret in nature as well that we had them pull down off the  
18 wall and put them face down on the work tables, ma'am.

19 Q. Why did you do that?

20 A. Because cameras in theater were a luxury and hard to come  
21 by, and we knew that had we taken pictures of that material up on the  
22 wall we would then have to secure that camera and keep it a Secret  
23 and would not be able to use it again in theater, ma'am.

1 Q. You mentioned you took photographs and did a sketch. Who  
2 did that?

3 A. I took the photographs and conducted a rough sketch of the  
4 scene, ma'am.

5 Q. Would you recognize them again if you saw them?

6 A. I would, ma'am.

7 MJ: All right. Hold on just a moment. We need to adjust -- Is  
8 it something you can do?

9 REPORTER: [Indicating a negative response.]

10 MJ: All right. We're going to stop now. We're having some  
11 slight technical difficulties.

12 WIT: Yes, ma'am.

13 MJ: So I'm going to ask if you could, you're just temporarily  
14 excused. We'll fix these technical difficulties and don't discuss  
15 your knowledge of the case with counsel or the accused or anyone.

16 WIT: Yes, ma'am.

17 MJ: So we're going to send the witness out. Go ahead.

18 WIT: Okay.

19 [The witness was temporarily excused, duly warned, and withdrew from  
20 the courtroom.]

21 MJ: Is this something we need to actually get up and we need to  
22 take a recess for it to be fixed?

23 REPORTER: [Indicating a positive response.]

1 MJ: All right. Why don't we go ahead and take a 10-minute  
2 recess. The court reporter has some audio problems and needs to get  
3 with a technician to fix those. As we all know, we take a verbatim  
4 record of trial of these proceedings and we want to make sure we  
5 capture them. Court is in recess.

6 **[The court-martial recessed at 1432. 3 June 2013.]**

7 **[The court-martial was called to order at 1441, 3 June 2013.]**

8 MJ: Court is called to order. Let the record reflect all  
9 parties present when the court last recessed are again present in  
10 court. Are we all squared away?

11 REPORTER: [Indicating an affirmative response.]

12 MJ: All right. The minute we are not do the same thing you  
13 just did. Tell me immediately.

14 Anything else we need to address before we recall the  
15 witness?

16 CDC[MR. COOMBS]: No, Your Honor.

17 ATC[CPT OVERGAARD]: No, ma'am.

18 MJ: Please recall the witness.

19 ATC[CPT OVERGAARD]: United States recalls Special Agent Thomas  
20 Smith.



1 SPECIAL AGENT THOMAS SMITH, U.S. Army, was recalled as a witness for  
2 the prosecution, was reminded he was still under oath, and testified  
3 as follows:

4 DIRECT EXAMINATION

5 Questions by the assistant trial counsel [CPT OVERGAARD]:

6 Q. And before we stopped you said that -- I asked you if you  
7 would recognize the photos you took of the SCIF if you saw them  
8 again?

9 A. Yes, ma'am.

10 Q. And would you?

11 A. Yes, ma'am.

12 Q. All right. I'm retrieving Prosecution Exhibit 19 for  
13 Identification.

14 Ma'am, I'm handing the witness what's been previously  
15 marked as Prosecution Exhibit 19 for Identification.

16 Do you recognize that, Agent Smith?

17 A. Yes, ma'am, I do.

18 Q. And can you tell us what it is?

19 A. It's a picture depicting the SCIF there on FOB Hammer,  
20 ma'am.

21 Q. How do you recognize that picture?

22 A. I'm the one that took the picture, ma'am.

23 Q. What viewpoint does that picture show?

1           A.     It shows the inside of the SCIF with the E and E or the  
2 entrance and exit to my back with a picture across the far side of  
3 the SCIF, ma'am.

4           Q.     And is that photo accurate?

5           A.     Yes, ma'am.

6           Q.     And when was it taken, do you recall?

7           A.     It would have been late in the evening of 27 May 2010,  
8 ma'am.

9           Q.     And does it accurately depict the SCIF on 27 May 2010?

10          A.     Yes, ma'am.

11          ATC[CPT OVERGAARD]: Ma'am, I'd like to offer what has been  
12 previously marked as Prosecution Exhibit 19 for Identification into  
13 evidence as Prosecution Exhibit 19.

14          MJ:    Any objection?

15          CDC[MR. COOMBS]:    No, ma'am.

16          MJ:    May I see it, please?

17          WIT:    Yes, ma'am [handing the exhibit to the military judge].

18          MJ:    Prosecution Exhibit 19 for Identification is admitted.

19          ATC[CPT OVERGAARD]: May I publish it, ma'am?

20          MJ:    Certainly.

21          [There was a pause while the assistant trial counsel published the  
22 exhibit onto the computer screen in the courtroom.]

23          [Examination of the witness continued.]

1 Q. What physical area of the SCIF did your team's  
2 investigation focus on?

3 A. We focused on what's depicted in that picture, two SIPRNET  
4 computers that are along the back wall there, ma'am.

5 Q. And could you circle that on the screen?

6 A. Yes, ma'am. That area along the back wall, ma'am.

7 Q. And why did you focus on that area?

8 A. When we were doing the canvass interviews with the shift  
9 workers that he worked with, those two work stations were identified  
10 as the work stations that he primarily used, ma'am.

11 Q. Before I continue, what color did you use to circle that?

12 A. Green, ma'am.

13 Q. Okay. Thank you. Can -- and did you collect any evidence  
14 from that area?

15 A. Yes, ma'am, I did.

16 Q. And what specifically did you collect?

17 A. I collected two government computers from that area, ma'am.

18 Q. What was the classification of those two government  
19 computers?

20 A. Secret, ma'am.

21 Q. Did you collect anything else from the SCIF?

22 A. Yes, ma'am. We collected a NIPR computer as well from the  
23 SCIF, ma'am.

1 Q. Is that on this photograph?

2 A. No, ma'am, it's not.

3 ATC[CPT OVERGAARD]: Ma'am, we're printing the screen with the  
4 green circle on it and we'll have it marked as Prosecution Exhibit 19  
5 Alpha.

6 MJ: All right. Any objection to that procedure?

7 CDC[MR. COOMBS]: No, ma'am.

8 MJ: All right.

9 Q. Now, I'm retrieving what has been previously marked for  
10 Identification as Prosecution Exhibit 20?

11 MJ: Prosecution Exhibit 19 Alpha is admitted.

12 ATC[CPT OVERGAARD]: Yes, ma'am. Prosecution moves to admit  
13 Prosecution Exhibit 19 Alpha for Identification as Prosecution  
14 Exhibit 19 Alpha.

15 ADC[MAJ HURLEY]: No objection.

16 ATC[CPT OVERGAARD]: I've retrieved what's been previously  
17 marked for Identification as Prosecution Exhibit 20.

18 MJ: Do you want Prosecution Exhibit 19 Alpha admitted?

19 ATC[CPT OVERGAARD]: Yes, ma'am. The prosecution moves to admit  
20 that Prosecution Exhibit 19 Alpha for Identification as Prosecution  
21 Exhibit 19 Alpha.

22 And I retrieved Prosecution Exhibit 20 for Identification.  
23 I am showing it to the defense.

1 I am handing Prosecution Exhibit 20 for Identification to  
2 the witness, ma'am.

3 [Examination of the witness continued.]

4 Q. Do you recognize that photo?

5 A. I do, ma'am.

6 Q. And can you tell us what that photo is?

7 A. It's a depiction of the inside of the SCIF with the SIGINT  
8 room to my back, shot across the -- across the the SCIF to the E and  
9 E of the room, ma'am.

10 Q. And how do you recognize that photo?

11 A. I took the photograph, ma'am.

12 Q. Okay. And when did you take that photo?

13 A. 27 May 2010, ma'am.

14 Q. How accurate is that photo?

15 A. It's an accurate depiction of the SCIF as we found it,  
16 ma'am.

17 Q. On what day?

18 A. 27 May 2010, ma'am.

19 ATC[CPT OVERGAARD]: And the United States offers what's been  
20 previously marked as Prosecution Exhibit 20 for Identification into  
21 evidence as Prosecution Exhibit 20.

22 ADC[MAJ HURLEY]: No objection, ma'am.

1 MJ: All right. Let me see it please. Prosecution Exhibit 20  
2 for Identification is admitted as Prosecution Exhibit 20.

3 ATC[CPT OVERGAARD]: May I publish it?

4 MJ: Yes, you may.

5 [There was a pause while the assistant trial counsel published the  
6 exhibit onto the computer screen in the courtroom.]

7 [Examination of the witness continued.]

8 Q. Special Agent Smith, can you point out that NIPR computer  
9 for us in the photograph?

10 A. Yes, ma'am. It's right here along this work station here.

11 Q. And what color did you use to circle that?

12 A. Yellow, ma'am.

13 Q. Who collected that NIPR computer?

14 A. I did, ma'am.

15 Q. And who collected the SIPR computers?

16 A. I did, ma'am.

17 Q. Did you collect all the evidence in the same way?

18 A. Yes, ma'am.

19 ATC[CPT OVERGAARD]: Ma'am, I'm printing Prosecution Exhibit 20  
20 with the yellow circle on it as Prosecution Exhibit 20A for  
21 Identification and moving to admit it as Prosecution Exhibit 20A.

22 MJ: Any objection?

23 ADC[MAJ HURLEY]: No, ma'am.

1 MJ: All right. When you get 19A and 20A printed, just hand them  
2 to me.

3 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

4 Q. Did you collect those NIPR -- that NIPR and those two SIPR  
5 computers in the same way?

6 A. I did, ma'am.

7 Q. Can you tell us how you collected them?

8 A. I went up to each system, photographed them in place. After  
9 photographing them in place I hit the shift key, took a picture of  
10 the monitor. After taking a picture of the monitor, I took pictures  
11 of the cables leading in and out of the computer and conduct a hard  
12 shutdown. I can't remember, and it doesn't matter which one you do I  
13 didn't remember if I pulled the pulled the plug and then the battery  
14 or if I pulled the batter and then the plug, but I conducted a hard  
15 shutdown of the computer, ma'am.

16 Q. What did you do with the evidence after you conducted the  
17 hard shut down?

18 A. After I conducted the hard shutdown of the computer, they  
19 were placed inside brown paper bags and placed into my backpack,  
20 ma'am.

21 Q. And are they -- Is that evidence documented anywhere?

22 A. Yes, ma'am. It was documented on a DA Form 4137.

23 Q. What is that?

1           A.    It's the evidence property E -- evidence property custody,  
2   ma'am, or EPCD.

3           Q.    And what did you record on 4137?

4           A.    The 4137 has the organization that's collecting the  
5   evidence.  Who or where it was collected from, a description of the  
6   evidence, and also contains the chain of custody for that evidence  
7   once it's collected, ma'am.

8           Q.    How is it used to track the chain of custody?

9           A.    It starts out with the first DALEO, or Department of the  
10   Army Law Enforcement Officer who collects that evidence.  He puts  
11   down where it was collected from or who it was collected from, and  
12   then each person that the evidence is handed or that takes possession  
13   of the evidence then signs the EPCD.

14          Q.    And was that evidence collected in accordance with your  
15   regulations?

16          A.    Yes, ma'am, it was.

17          Q.    Did you ensure that you didn't modify the data in any way?

18          A.    Yes, ma'am.

19          Q.    Did you investigate any other part of the SCIF?

20          A.    No, ma'am.  We focused primarily on the general SCIF area.

21          Q.    And why was that?

22          A.    There was a -- the second section of the SCIF area was a  
23   SIGINT collection cell.  PFC Manning did not have an immediate work



1 station back there to work out of, and plus they were actively  
2 engaged in the mission at the time we were there.

3 Q. And what's the classification of information in the SIGINT  
4 cell?

5 A. That's always Top Secret, ma'am.

6 Q. Agent Smith, you also mentioned that you make a sketch of  
7 the area?

8 A. Yes, ma'am.

9 Q. Did you do that in this case?

10 A. Yes, ma'am.

11 Q. How did you prepare that sketch?

12 A. At the scene, just pen and ink sketch, just a rough sketch  
13 depicting what the overall scene, and then afterwards go in and add  
14 the evidence and where it was being collected from, ma'am.

15 ATC[CPT OVERGAARD]: Your Honor, I'm retrieving what's been  
16 previously marked as Prosecution Exhibit 17 for Identification. I'm  
17 handing it to the witness, ma'am.

18 Q. Do you recognize that?

19 A. Yes, ma'am.

20 Q. Can you tell us what it is?

21 A. It's a rough sketch depicting the SCIF.

22 Q. And how do you recognize that picture, or that diagram?

23 A. I'm the one that conducted the sketch, ma'am.

1 Q. And how are you familiar with that building in particular?

2 A. We were in -- This building we were inside the SCIF  
3 specifically for the canvass interviews as well as the crime scene  
4 itself, ma'am.

5 Q. How accurate is that sketch that you did?

6 A. It's an accurate depiction of the SCIF, not to scale.

7 Q. And who put the labels on the diagram showing what each  
8 object represents?

9 A. I am, ma'am.

10 Q. When did you record those locations, those pieces of  
11 evidence -- where those pieces of evidence were located?

12 A. I would have placed them on the original pen and ink sketch  
13 as each piece of evidence was being collected, ma'am.

14 Q. Okay. So you draw the picture first and then you label it  
15 as you're going through?

16 A. Yes, ma'am.

17 Q. And you said it was originally in a pen and ink. How did  
18 it get to be in that format?

19 A. Once I got back to the CHU, after a little bit of sleep,  
20 once I got back to the CHU I woke up, I then transferred my notes  
21 from pen and ink onto a, and I can't remember if I was using a Word  
22 or Outlook, but one of those two programs to generate this sketch,  
23 ma'am.

1 Q. Is that an accurate copy of what you had in your pen and  
2 ink sketch?

3 A. It is, ma'am.

4 ATC[CPT OVERGAARD]: Ma'am, the United States offers what's been  
5 previously marked as Prosecution 17 -- Prosecution Exhibit 17 for  
6 Identification as Prosecution Exhibit 17.

7 ADC[MAJ HURLEY]: No objection. 17?

8 ATC[CPT OVERGAARD]: 17, yes.

9 ADC[MAJ HURLEY]: Ma'am, no objection.

10 MJ: May I see it, please?

11 WIT: Yes, ma'am [handing exhibit to the military judge].

12 MJ: Prosecution Exhibit 17 for Identification is admitted.

13 TC[CPT OVERGAARD]: May I publish that, ma'am?

14 MJ: Yes.

15 [There was a pause while the assistant trial counsel published the  
16 exhibit onto the computer screen in the courtroom.]

17 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

18 Q. Can you orient us to this sketch?

19 A. Yes. In the picture depicted the E and E is the entrance  
20 and exit of the facility which is in the bottom right-hand corner of  
21 the picture.

22 Q. Okay. And that's the door?

23 A. Correct, ma'am.

1 Q. Okay. And where was the evidence that you collected?

2 A. Located in two different areas. The two SIPR computers  
3 were collected from Alpha and Bravo, and then the NIPR computer was  
4 collected from Charlie, ma'am.

5 Q. And what did you do with this evidence after you collected  
6 it?

7 A. After I collected it, it was placed into a paper bag and  
8 placed into my book bag, ma'am.

9 Q. And why did you have it in a backpack?

10 A. In order to maintain the evidence for accountability,  
11 ma'am.

12 Q. Did you ever move it to a different container?

13 A. Yes, ma'am.

14 Q. And what was that container?

15 A. Once we were there the unit provided us with a large foot  
16 locker and two 5200 series locks and we provided -- at that point  
17 started putting all the evidence we collected into that foot locker,  
18 ma'am.

19 Q. And why did you use a foot locker there instead of an  
20 evidence room?

21 A. FOB Hammer did not have a PMO section, so there was no  
22 evidence room on FOB Hammer, ma'am.

1 Q. Do you have any reason to believe that the evidence  
2 suffered any sort of damage or contamination?

3 A. No, ma'am.

4 Q. You also mentioned that you searched the accused's CHU?

5 A. Yes, ma'am.

6 Q. And who else searched that CHU with you?

7 A. It was myself and Agent Toni Graham, ma'am.

8 Q. Can you tell us what a CHU is?

9 A. A CHU, Containerized housing unit, ma'am.

10 Q. And what is that?

11 A. Basically it's a container that has been broken down into  
12 two or three different housing areas for Soldiers to live in, ma'am,  
13 while deployed.

14 Q. How far apart were -- How far apart was the CHU from the  
15 SCIF?

16 A. A hundred, 200 yards, ma'am.

17 Q. And how did you determine that you needed to, or how did  
18 you determine what CHU was the accused's?

19 A. The -- PFC Manning's command actually drove us over, or not  
20 drove, but walked us over there and showed us which CHU it was,  
21 ma'am.

22 Q. How did you determine what items in there you could -- you  
23 should search?

1           A.    We waited for PFC Manning's command to get his roommate,  
2 and once his roommate came in, we had his roommate step inside and  
3 show us which side of the room was his. Basically which bunk was  
4 his, which wall locker was his and which stack of TA 50 was his,  
5 ma'am.

6           Q.    And what did you do once you first entered the CHU?

7           A.    Once I went in -- Once he stepped out and I went in, at  
8 that point we started conducting the exam consisting of photographs,  
9 then we did a rough sketch of the overview of the room, and at that  
10 point we started conducting a search of the room, ma'am.

11          Q.    What did you photograph?

12          A.    We photographed the entire room as we found it.

13          Q.    Would you recognize those photographs if I showed them to  
14 you again?

15          A.    I would, ma'am.

16          ATC[CPT OVERGAARD]: I'm retrieving what's been marked as  
17 Prosecution Exhibit 16 for Identification. 18. Yes. Sorry. 18 for  
18 Identification. Handing that to the witness.

19          Q.    Do you recognize that?

20          A.    Yes, ma'am, I do.

21          Q.    And can you tell us what it is?

22          A.    It's a photograph depicting the CHU belonging to PFC  
23 Manning and his roommate, ma'am.

1 Q. How did you recognize it?

2 A. I'm the one that took the photograph.

3 Q. Can you tell us what viewpoint that photograph shows?

4 A. It's a photograph just as you enter the room with the E and  
5 E to my back, and it's a shot taken across the room to the far  
6 corner, ma'am.

7 Q. All right. And again, when you say E and E, that's the  
8 door?

9 A. Yes, ma'am.

10 Q. How accurate is that photograph?

11 A. It's an accurate depiction of how we found the CHU that  
12 evening, ma'am.

13 Q. And what was the date, do you remember?

14 A. Actually at that point it had rolled over to 28 May 2010,  
15 ma'am.

16 Q. Does it accurately reflect the CHU as you found it on 28  
17 May 2010?

18 A. Yes, ma'am, it does.

19 ATC[CPT OVERGAARD]: Your Honor, I offer -- the United  
20 States offers what's previously been marked as Prosecution Exhibit 16  
21 for Identification into evidence as Prosecution Exhibit 16.

22 ADC[MAJ HURLEY]: No objection, ma'am.

23 MJ: May I see it, please?

1 WIT: Yes, ma'am [handing the military judge the exhibit].  
2 MJ: Thank you. Prosecution Exhibit 16 for Identification is  
3 admitted. or 18, excuse me.  
4 ATC[CPT OVERGAARD]: 18. I'm sorry, ma'am.  
5 MJ: For the record, we're talking about Prosecution Exhibit ---  
6 -  
7 ATC[CPT OVERGAARD]: 18, ma'am.  
8 MJ: ---- 18 ----  
9 ATC[CPT OVERGAARD]: Yes, ma'am.  
10 MJ: ---- not Prosecution Exhibit 16.  
11 ATC[CPT OVERGAARD]: May I publish it, ma'am?  
12 MJ: Yes.  
13 [There was a pause while the assistant trial counsel published the  
14 exhibit onto the computer screen in the courtroom.]  
15 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**  
16 Q. How did you and Agent Graham examine the CHU?  
17 A. Agent Graham started with PFC Manning's wall locker which  
18 is on the opposite wall just out of view and worked towards the foot  
19 of the bed. I started at the head of the bed and the night stand and  
20 worked towards the foot of the bed, ma'am.  
21 Q. What part of the CHU did the investigation focus on? Did it  
22 focus on one side or the other?



1           A.    It focused on PFC Manning's personal belongings on the far  
2 side of the CHU, ma'am, or on the right-hand side of the CHU.

3           Q.    Okay. And what did you specifically -- or what did you  
4 find when you searched the CHU?

5           A.    While searching the CHU I found several writable CDs, a  
6 laptop computer, as well as a CD holder containing a writable CD  
7 disk, ma'am.

8           Q.    Could you -- Could we talk about each one in turn?

9           A.    Yes, ma'am.

10          Q.    Could you tell us in this photograph where you found the,  
11 you say the laptop?

12          A.    Yes. The laptop is sitting on top of a portable computer  
13 desk.

14          Q.    Could you point that out for us?

15          A.    Yes, ma'am. It's here, ma'am.

16          Q.    And you circled it in blue?

17          A.    Yes, ma'am.

18          Q.    What kind of laptop was that?

19          A.    It was an Apple laptop, ma'am.

20          Q.    And how did you know it belonged to the accused?

21          A.    First off, we asked his roommate which side of the room was  
22 his and what was his personal property. Also, the orientation of the

1 computer was with the screen facing PFC Manning's bunk as well as the  
2 keyboard, ma'am.

3 Q. And who collected this piece of evidence?

4 A. I did, ma'am.

5 Q. How did you collect it?

6 A. Photographed it in place. I hit the shift key,  
7 photographed the scene, then conducted a hard shutdown on the  
8 computer.

9 Q. So in accordance with your regulations?

10 A. Yes, ma'am.

11 Q. What happened with this evidence after you collected it?

12 A. It was placed inside a brown paper bag, and by this time  
13 the command had provided us with a large foot locker so it was put  
14 into the foot locker and locked.

15 Q. And do you have any reason to believe this evidence  
16 suffered any damage or contamination?

17 A. No, ma'am.

18 Q. Let's move on to the CDs that you mentioned.

19 A. Okay.

20 Q. Can you show us where those were in the CHU?

21 A. Which CDs, ma'am, because they were found pretty much in  
22 two separate areas?

23 Q. Let's start with the first area.

1           A.    Okay. This area here at the night stand is where we found a  
2 handful, five, ten maybe, writable CDs.

3           Q.    And that -- the area circled in black?

4           A.    Yes, ma'am.

5           Q.    And how do you know they were writable CDs, what does that  
6 mean?

7           A.    Writable CDs, generic CDs that can be purchased from the  
8 store for the purpose of the owner putting data on them.

9           Q.    And who collected those?

10          A.    I did, ma'am.

11          Q.    And how did you collect those?

12          A.    They were collected, placed into a smaller brown paper bag  
13 and placed inside the trunk, ma'am.

14          Q.    In accordance with your regulations?

15          A.    Yes, ma'am.

16          Q.    And how about the -- You said there was another CD. Where  
17 was that one?

18          A.    That other CD was found here amongst these boxes, ma'am.

19          Q.    And that's circled in pink?

20          A.    Yes, ma'am.

21          Q.    What was that CD?

1           A.    It was a CD, it was a writable CD that had handwriting as  
2 well as a Secret -- a military Secret sticker on it, and some label  
3 maker sticker on it, ma'am.

4           Q.    It had a label maker sticker? Do you remember what that  
5 sticker said?

6           A.    I believe it was 12 July 2007, Engagement Zone 30 CZ or  
7 something to that effect, ma'am.

8           Q.    Would you remember that CD if you saw it again?

9           A.    I would, ma'am.

10          ATC[CPT OVERGAARD]: I'm retrieving what's been marked as  
11 Prosecution Exhibit 15 for Identification. Handing the witness  
12 Prosecution Exhibit 15 for Identification.

13 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

14          Q.    Do you recognize that?

15          A.    Yes, ma'am.

16          Q.    Can you tell us what it is?

17          A.    This is the CD case that contained the writable CD.

18          Q.    And how do you know?

19          A.    Because I'm the one that collected it, ma'am.

20          Q.    Is there anything that stands out to you about it?

21          A.    Just the pre-writing and all that was on it, the Reuters,  
22 F-O-I-A, R-E-Q or request.

1 Q. And as best you can tell, is that the -- has the evidence  
2 changed in any way since you collected it?

3 A. Not that I can tell, ma'am.

4 Q. And when did you collect it?

5 A. I collected it the 28th of May, 2010, ma'am.

6 ATC[CPT OVERGAARD]: The United States offers what's been  
7 previously marked as Prosecution Exhibit 15 for Identification into  
8 evidence as Prosecution Exhibit 15.

9 MJ: Any objection?

10 ADC[MAJ HURLEY]: No objection, ma'am.

11 CDC[MR. COOMBS]: Ma'am, may we have a moment?

12 MJ: Yes. Just to make sure that the record is clear,  
13 Prosecution Exhibit 15 for Identification has one, two, three, four  
14 CDs in it. One of them is relevant? Or one of them you're offering  
15 or ----

16 ATC[CPT OVERGAARD]: We're offering the whole thing.

17 MJ: The whole thing. Okay. Got it. Prosecution Exhibit 15 is  
18 admitted.

19 ATC[CPT OVERGAARD]: The government printed the Prosecution  
20 Exhibit 18 with the markings on it and moves to admit it as  
21 Prosecution Exhibit 18 Alpha.

22 ADC[MAJ HURLEY]: No objection, ma'am.

23 ATC[CPT OVERGAARD]: May I publish this, ma'am?

1 MJ: Yes.

2 [There was a pause while the assistant trial counsel published the  
3 exhibit onto the computer screen in the courtroom.]

4 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

5 Q. Agent Smith, is this -- how do you know that this was a CD  
6 that you found?

7 A. I recognize the container that it was in and, as I said  
8 previously, I recognize the actual markings that are on the CD in  
9 question.

10 Q. Can you tell us what those specific markings were?

11 A. The 12 July 07, CZ Engagement Zone 30 GC off the printer --  
12 label printer, and then also the DoD Secret sticker and the Reuters  
13 F-O-I-A, R-E-Q, ma'am.

14 Q. Is that an official DoD Secret sticker, do you know?

15 A. It is, ma'am.

16 Q. How do you know that?

17 A. My time working with the -- on the MI side of the world,  
18 ma'am.

19 Q. And how did you -- Did you collect this CD?

20 A. I did, ma'am.

21 Q. How did you collect it?

1           A.    I collected the entire case, placed it inside a brown paper  
2 bag, and then it went into the black trunk or the foot locker, it was  
3 locked up, ma'am.

4           Q.    Did you collect anything else from the CHU?

5           A.    Yes, ma'am. I collected an external hard drive and a  
6 camera.

7           ATC[CPT OVERGAARD]: I'm going to retrieve Prosecution Exhibit 15  
8 and publish it.

9   [There was a pause while the assistant trial counsel published the  
10 exhibit onto the computer screen in the courtroom.]

11 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

12          Q.    Do you remember where the external hard drive was found?

13          A.    Yes. The external hard drive was found inside a day sack  
14 belonging to PFC Manning.

15          Q.    Can you show us where that is on the photo?

16          A.    I can't make out specifically which one is the -- is the  
17 day sack, but it would have been amongst his TA 50 there inside the  
18 room at the foot of the bed, ma'am.

19          Q.    What you circled in pink?

20          A.    Yes, ma'am.

21          Q.    And you also said you found a camera?

22          A.    Yes, ma'am.

23          Q.    Where did you find a camera?

1       A.    The camera was found on top of the foot locker here, ma'am.

2       Q.    And that's what you circled in red?

3       A.    Yes, ma'am.

4       Q.    And who collected this evidence?

5       A.    I did, ma'am.

6       Q.    And why did -- who found the evidence?

7       A.    Agent Toni Graham, ma'am.

8       Q.    And why did you collect it?

9       A.    It's easier for accountability and also for documentation

10   for one agent to collect all the evidence out of the crime scene

11   instead of having two or three different people collecting one or two

12   items, it's easier to have one person collect and process all of the

13   evidence inside the crime scene, ma'am.

14       Q.    How did you collect this evidence?

15       A.    It was placed inside brown paper bags and then placed into

16   the foot locker and locked, ma'am.

17       Q.    In accordance with your regulations?

18       A.    Yes, ma'am.

19       ATC[CPT OVERGAARD]: Ma'am, the government moves to admit the

20   photograph with the two circles on it, the pink and red, as

21   Prosecution Exhibit 18 Charlie or Bravo, 18 Bravo.

22       ADC[MAJ HURLEY]:    We're on 18? This isn't 15?

23       ATC[CPT OVERGAARD]: No, this is 18.



1           ADC[MAJ HURLEY]:     Okay.  No objection, ma'am.

2           MJ:  I believe that is a good clarification for the record.  I

3 believe you did call it Prosecution Exhibit 15 before.  Just so the

4 record is clear, we're talking about Prosecution Exhibit 18 and that

5 is what's being published.  And this is 18 Bravo.  So you have no

6 objection, right?

7           ADC[MAJ HURLEY]:     I do not.

8           MJ:  All right.

9           ATC[CPT OVERGAARD]: Yes, ma'am.  Thank you.

10   **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

11          Q.  And you mentioned before that you sketched the area as

12 well.  How did you do that?

13          A.  I just conducted a pen and ink or a pen and paper sketch at

14 the scene, ma'am.

15          Q.  Did you mark all the evidence that you recovered?

16          A.  Yes, ma'am.

17          ADC[MAJ HURLEY]:     Ma'am, we're not going to have an objection

18 to the sketch as long as they go through some of the foundation

19 questions.

20          MJ:  All right.

21          ATC[CPT OVERGAARD]: United States moves to admit what's been

22 marked as Prosecution Exhibit 16 for Identification as Prosecution

23 Exhibit 16.

1 MJ: All right. And since there's no objection, Prosecution  
2 Exhibit 16 for Identification is admitted.

3 ATC[CPT OVERGAARD]: May I publish this, ma'am?

4 MJ: Yes.

5 [There was a pause while the assistant trial counsel published the  
6 exhibit onto the computer screen in the courtroom.]

7 **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

8 Q. Agent Smith, who put the legend on the sketch?

9 A. I did, ma'am.

10 Q. And when did you do that?

11 A. The next morning after waking up and getting oriented,  
12 ma'am.

13 Q. And can you orient us to this sketch?

14 A. Yes. The E and E to the CHU, entrance and exit, is in the  
15 bottom right-hand corner of the picture, ma'am.

16 Q. And where is all the evidence that you collected, can you  
17 just point it out?

18 A. Yes, ma'am. Right here in this area is where we collected  
19 various CDs, they were both on top of and inside the night stand.

20 Q. That's the red circle?

21 A. Yes, ma'am. The green circle here is where we collected  
22 the laptop computer from.

23 Q. And that's marked A, and with a green circle?

1           A.    Yes, ma'am. F is the cardboard boxes where we collected  
2 the CD case from marked in yellow. G marked in -- okay. G marked in  
3 blue is where the camera was collected off of. And then right here  
4 where it says "Various TA 50" marked in pink was in amongst there,  
5 was his day pack where we collected the hard drive off of, ma'am.

6           ATC[CPT OVERGAARD]: Ma'am, the United States moves to admit the  
7 marked up version of Prosecution Exhibit 16 as Prosecution Exhibit 16  
8 Alpha.

9           ADC[MAJ HURLEY]:    No objection, ma'am.

10          MJ:   All right. Prosecution Exhibit 16 Alpha is admitted.

11       **Questions continued by the assistant trial counsel [CPT OVERGAARD]:**

12          Q.    And what did you do with all the evidence?

13          A.    The evidence was placed into brown paper bags, placed into  
14 the foot locker and locked, ma'am.

15          Q.    And did you search any other -- and other -- any other  
16 place? Did you process any other crime scenes when you were at FOB  
17 Hammer?

18          A.    No, ma'am, I did not.

19          Q.    And did anyone else on your team?

20          A.    Agent Toni Graham did the supply room and collected some  
21 evidence from there, ma'am.

22          Q.    And what were you doing while Agent Graham was searching  
23 the supply room?

1           A.    I was guarding the evidence, I was doing administrative  
2 stuff, I was preparing the sketches that you saw. I was writing up  
3 the crime scene exam from the night prior, ma'am.

4           Q.    Did Agent Graham bring you any evidence that she collected  
5 from the supply room?

6           A.    Yes, ma'am, she did.

7           Q.    And do you remember what she brought you?

8           A.    She brought me one laptop computer and two external hard  
9 drives, ma'am.

10          Q.    External hard drives, what were those external hard drives?

11          A.    One NIPR and one SIPR, if I'm not mistaken, ma'am.

12          Q.    Were they government hard drives?

13          A.    Yes, ma'am, they were.

14          Q.    And what did you do when Agent Graham handed you that  
15 evidence?

16          A.    I typed up the 4187 [sic] and then those items, by this  
17 time I had run out of brown paper bags, by this time, so I typed up  
18 the EPCD and gave it to her to take it back for signature and the  
19 actual evidence itself was placed into the foot locker and locked,  
20 ma'am.

21          Q.    And how do you know?

22          A.    Because I'm the one that locked it up and secured it,  
23 ma'am.

1 Q. Were all the pieces of evidence that your team collected at  
2 FOB Hammer locked into that foot locker?

3 A. Yes, ma'am.

4 Q. And who guarded that foot locker?

5 A. I guarded it the majority of the time, ma'am, except to go  
6 and eat one meal and showers. The rest of the time when I was not  
7 guarding it, it was under armed guard by either the MI Soldier that  
8 was present or by Agent Toni Graham, ma'am.

9 Q. So was it guarded the whole time?

10 A. Yes, ma'am.

11 Q. Was it ever left unattended?

12 A. No, ma'am.

13 Q. And who maintained the keys to that foot locker?

14 A. I did, ma'am.

15 Q. And after other people guarded the foot locker, did you  
16 insure the sanctity of the evidence in any other way?

17 A. I did, ma'am. Upon returning to the CHU and taking over  
18 watch of the evidence I conducted a hundred percent inventory of the  
19 evidence.

20 Q. What happened to the foot locker when you wrapped up the  
21 investigation at FOB Hammer?

22 A. It was placed on to the chopper with myself and flown back  
23 to VBC, ma'am.

1 Q. It was with you the whole time?

2 A. Yes, ma'am.

3 Q. What did you do with it when you got to Camp Liberty?

4 A. Camp Liberty, we transferred it from there to FOB Liberty

5 where the actual CID office was, and the evidence was transferred

6 from there into the temporary evidence safe inside the CID office,

7 ma'am.

8 Q. And what kind of safe is that?

9 A. It's a large metal wall locker that has a metal hasp and a

10 5200 series lock on it, ma'am.

11 Q. And who took possession of the evidence after -- did it

12 leave the locker at all?

13 A. It did. After we got back and got settled I signed all the

14 evidence over to Agent Robertson, ma'am.

15 Q. Who is Agent Robertson?

16 A. He's an agent with the CCIU, Computer Crimes Investigative

17 Unit for CID out of Germany, ma'am.

18 Q. Was all of the evidence that you collected from FOB Hammer

19 turned over to Agent Robertson?

20 A. It was, ma'am.

21 Q. And you said you filled out the 4137?

22 A. Yes, ma'am.

23 Q. Do you know why Agent Robertson took possession?

1           A.   Agent Robertson was going to begin a triage look at the  
2 evidence to see what if anything he could find on the computers.  
3           Q.   And what role did you have in that process?  
4           A.   Outside of talking to him, you know, every now and again to  
5 find out if he found anything, none.  
6           Q.   And how do you know the evidence went to him?  
7           A.   Because I did a hundred percent turnover of the evidence to  
8 him.  
9           Q.   When was that?  
10          A.   30 May 2010, ma'am.  
11          Q.   And before you turned that evidence over to him, do you  
12 have any reason to believe that it suffered any damage or  
13 contamination?  
14          A.   No, ma'am.  
15          ATC[CPT OVERGAARD]: Thank you.  
16          MJ: Cross-examination.  
17          ADC[MAJ HURLEY]:     Yes, ma'am.

18                                   **CROSS-EXAMINATION**

19   **Questions by the assistant defense counsel [MAJ HURLEY]:**

20          Q.   Special Agent Smith.  
21          A.   Yes, sir.  
22          Q.   You participated in drafting the investigative plan for  
23 this case?

1       A.    The investigative plan?

2       Q.    Yes.  Well, at some point it was determined that canvass  
3 interviews would be done?

4       A.    Yes, sir.

5       Q.    And then a crime scene investigation would occur?

6       A.    Right.  And that's standard, so I've ----

7       Q.    Right.  So there wasn't much in terms of a formal planning  
8 process to talk about what you would do at FOB Hammer once you  
9 arrived?

10      A.    There was some discussion, but it was pretty much segmented  
11 and everyone had their goal and their task when they hit the ground,  
12 sir.

13      Q.    Right.  And part of your goals and task was to go to the  
14 TOC and to conduct canvass interviews?

15      A.    Yes, sir.

16      Q.    And you did that, except for briefing the command, you did  
17 that immediately upon your arrival?

18      A.    Yes, sir.

19      Q.    And you talked to everyone you could find in the S-2  
20 section?

21      A.    Everyone that was identified as working on his shift inside  
22 the SCIF, sir, yes.

23      Q.    And that's both for the S-2 section and the S-4 section?



1           A.    I don't know who was talked to -- that night when I did the  
2 canvass interviews, sir, I don't remember talking to anyone from the  
3 S-4. All the people I spoke to were from the S-2 side of the SCIF,  
4 sir.

5           Q.    You -- When you are conducting -- Let's just talk about  
6 canvass interviews ----

7           A.    Okay.

8           Q.    ---- interviews generally. You have a set series of  
9 questions that you want to ask in a canvass interview?

10          A.    Yes, sir.

11          Q.    Now, that may not be all the questions you ask, but the set  
12 ones that you ask are pretty standard?

13          A.    Well, they're standard in reference to that investigation,  
14 but I can't ask the same questions for a computer crime as I would do  
15 for a sexual assault, sir. So ----

16          Q.    Right. Once you agree upon the questions in a particular  
17 investigation, that's a series of questions?

18          A.    Yes, sir.

19          Q.    And the idea of a canvass interview is to identify those  
20 people who you want to formally interview?

21          A.    Yes, sir.

22          Q.    So you're looking to get more information?

23          A.    Yes, sir.

1 Q. And you mentioned now when you're doing investigation --  
2 any interview of whatever duration, you're going to identify  
3 yourself?

4 A. Yes, sir.

5 Q. As a member of the Criminal Investigation Command?

6 A. Yes, sir.

7 Q. And you're going to identify generally what you want to  
8 talk about?

9 A. Yes, sir.

10 Q. In this case you, a lot of the questions -- your set of  
11 questions identified PFC Manning?

12 A. Yes, sir.

13 Q. And in this canvass interview, if the witness has more  
14 information, you're not going to stop him, are you?

15 A. No, sir.

16 Q. And if they had something to say, you would further develop  
17 that information?

18 A. Yes, sir.

19 Q. Do you recall specifically identifying any individuals that  
20 you canvassed for additional interviews?

21 A. No, sir.

1 Q. And as you're interviewing these witnesses, if someone  
2 would have told you more about PFC Manning, a lot about PFC Manning,  
3 you would have identified that individual for a follow-up interview?

4 A. Yes, sir.

5 Q. And that interview would be included in your investigative  
6 report?

7 A. Yes, sir.

8 Q. And in all likelihood you'd write an agent investigative  
9 report, an AIR on that interview as well?

10 A. When we do an AIR entry, but the AIR itself is a living  
11 document covering a large aspect of it. There would be an AIR entry  
12 pertaining to that interview, but the AIR specific to that interview  
13 would not be done, sir.

14 ADC[MAJ HURLEY]: Thank you, Special Agent Smith. I have no  
15 further questions.

16 MJ: Any redirect?

17 ATC[CPT OVERGAARD]: One moment, ma'am.

18 No, ma'am. Thank you.

19 MJ: All right. Special Agent Smith, I just have a couple  
20 questions following up the cross-examination.

## EXAMINATION BY THE COURT-MARTIAL

Questions by the military judge:

Q. If I understood, did I understand your testimony to be that you do canvass interviews with people to determine whether they know something more that maybe you need to develop further questions to flush out that information from those people?

A. Right, ma'am. We usually go into it and usually you start out with five or six generic questions that you're going to ask everybody, okay. And then if someone starts to give information that's pertinent to that, at that point you start asking follow-up questions pertaining to -- pertaining to the --pertaining to it. And then at that point, hey, you know, once you realize that that individual does have significant information and all pertaining to the investigation, at that point you can either pull them aside and actually do a full interview of them, or you can schedule an appointment for them to come in and provide a statement, ma'am.

Q. And the people that you interviewed, I believe you said it was on the 28th of May, 27th of May?

A. 27th of May, Your Honor.

Q. Did you pull aside any of those people for more significant interviews or were they all at the canvass level?

A. They were all at the canvass level because no one actually saw any misdoings on the computers, ma'am, and that's what the

1 canvass interviews meant to do is to try and find an individual that  
2 might have saw something, okay. You know, a lot of his co-workers  
3 and all, they saw the fight and all that took place in the SCIF.

4 MJ: Okay. I'm good.

5 Counsel, any follow-up from my questions?

6 ADC[MAJ HURLEY]: None from the defense, ma'am.

7 ATC[CPT OVERGAARD]: Just one, ma'am.

8 **REDIRECT EXAMINATION**

9 **Questions by the assistant trial counsel [CPT OVERGAARD]:**

10 Q. Does that mean that no statements were taken from other  
11 people or just that you didn't take any?

12 A. I took one statement the time that I was at FOB Hammer from  
13 Specialist or Private Sadtler or something to that effect, and I  
14 don't remember if there were any other statements taken while we were  
15 out there or not, ma'am.

16 ATC[CPT OVERGAARD]: Okay. Thank you.

17 MJ: All right. Anything from the defense?

18 ADC[MAJ HURLEY]: No, ma'am.

19 MJ: All right. Temporary or permanent excusal?

20 ATC[CPT OVERGAARD]: Temporary, ma'am.

21 MJ: All right. Now, with the temporary excusals are we --  
22 well, we can talk about that at a recess. Are we keeping people in

1 the building or does it vary witness by witness, what do you want to  
2 do?

3 TC[MAJ FEIN]: May it vary witness by witness based off if  
4 there's an authentication issue, we'd recall for instance, Special  
5 Agent Smith, but other witnesses are being recalled knowing we're  
6 actually calling them back. So it will vary by witness.

7 MJ: So when I temporarily excuse witnesses they know where to  
8 go?

9 TC[MAJ FEIN]: They will absolutely know where to go, ma'am.

10 MJ: All right.

11 **[The witness was temporarily excused, duly warned, and withdrew from**  
12 **the courtroom.]**

13 TC[MAJ FEIN]: United States requests a 10-minute recess,  
14 comfort break.

15 MJ: Court is in recess until 1530.

16 **[The court-martial recessed at 1526, 3 June 2013.]**

17 **[The court-martial was called to order at 1539, 3 June 2013.]**

18 MJ: Court is called to order. Let the record reflect all  
19 parties present when the court last recessed are again present in  
20 court.

21 Government, are you ready to call your next witness?

22 ATC[CPT OVERGAARD]: Yes, ma'am. The United States calls Special  
23 Agent Toni Graham.

1 SPECIAL AGENT TONI GRAHAM, U.S. Army, was called as a witness for the  
2 government, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the assistant trial counsel [CPT OVERGAARD]:

5 Q. And you are Special Agent Toni Graham?

6 A. Yes, ma'am.

7 Q. And what is your rank?

8 A. CW2.

9 Q. Where are you currently assigned, Agent Graham?

10 A. To the Hawaii CID office in Schofield Barracks.

11 Q. And where is that?

12 A. Schofield Barracks, Hawaii.

13 Q. What's your position?

14 A. I'm the General Crimes Team Chief.

15 Q. And what does the General Crimes Team Chief do?

16 A. We supervise investigations on general crimes.

17 Q. And what are general crimes?

18 A. General crimes are all investigations with the exception of  
19 sex offenses and drug offenses.

20 Q. What was your previous assignment?

21 A. The General Crimes Team Chief at the Fort Knox CID Office.

22 Q. And when were you at Fort Knox?

23 A. From 2009 to 2011.

1 Q. And before you were at Fort Knox where were you assigned?  
2 A. Fort Polk, CID.  
3 Q. And when was that?  
4 A. 2005 to 2009.  
5 Q. So how long have you been a CID Agent?  
6 A. For eight years.  
7 Q. And how long have you been a warrant officer?  
8 A. For four years.  
9 Q. What did you do before you became a CID agent?  
10 A. I was Military Police.  
11 Q. And what did you do as a Military Police officer?  
12 A. As Military Police I worked patrol on the road, I worked as  
13 a desk sergeant at the PMO, and I also worked physical security at  
14 SCIFs.  
15 Q. And could you explain those a little bit more? What's  
16 patrol mean as an MP?  
17 A. Patrol is like the regular what you think a military cop,  
18 riding a patrol car, responding to domestics.  
19 Q. How about a desk sergeant, what is that?  
20 A. Desk sergeant is like a supervisor for the shift, you sit  
21 on the desk and receive calls from 9-1-1 complaints or anyone that  
22 has any kind of issue, and then you have the patrols respond to the  
23 scenes.



1 Q. So how about you said physical security, what is that?

2 A. Yes, ma'am. I worked physical security at a SCIF in Fort

3 Belvoir. Basically you just conduct searches on people entering and

4 exiting the SCIF and man the location, make sure it's secured.

5 Q. Do you go into the SCIF at all?

6 A. Yes, ma'am.

7 Q. And how much -- or how often do you go into the SCIF?

8 A. Typically it's three times a day for patrols or for

9 security checks to make sure all the doors are locked.

10 Q. So how long have you been in law enforcement for the Army?

11 A. Thirteen years.

12 Q. And how long have you been in the Army?

13 A. Thirteen years.

14 Q. What training did you receive to become an MP?

15 A. As an MP we receive -- attend an OSUT training which is

16 just the MP AIT.

17 Q. What does OSUT mean?

18 A. One Station Unit Training.

19 Q. And what training did you receive while you were an MP, any

20 advanced training?

21 A. I did. I attended the Military Police Investigations

22 Course.

23 Q. What do you learn there?

1       A.   How to become a Military Police Investigator.

2       Q.   Does it involve any crime scene evaluation?

3       A.   Yes, ma'am.  It's crime scenes, interviews, interrogations,

4 collection of evidence, quick law background, Constitutional Law

5 stuff, things like that, amendment rights, and weapons training.

6       Q.   Have you had any evidence collection training?

7       A.   Yes, ma'am.

8       Q.   And where was that?

9       A.   That was at Fort Leonard Wood, Missouri.

10      Q.   What kind of training was it, or what school was it?

11      A.   The Military Police Investigations course.

12      Q.   What training have you received to become a CID Special

13 Agent?

14      A.   You attend the Apprentice Special Agent Course, its basic

15 fundamentals and what to expect from you as a CID Agent.

16      Q.   And is that your AIT?

17      A.   Yes, ma'am.

18      Q.   How about since you've been a CID Special Agent, have you

19 had any additional training?

20      A.   Yes, ma'am, I have.

21      Q.   What have you done?

22      A.   I've attended the Protective Service Course the Advanced

23 Crime Scene Course, the Special Agent Laboratory Training Course,

1 with Evidence Management, Hostage Negotiations, Special Victim's Unit  
2 Course, Post Blast Investigations.

3 Q. So a lot of training?

4 A. Yes, ma'am.

5 Q. Did any of that training focus on crime scene evaluation?

6 A. Yes, ma'am.

7 Q. And what training focused on that?

8 A. The Advanced Crime Scene Examination Course focuses on that  
9 as well as Special Agent Laboratory Course, Laboratory Training  
10 Course.

11 Q. What does it mean to evaluate a crime scene?

12 A. Well, to evaluate a crime scene you respond to a location  
13 where an alleged crime occurred and you inspect the location for  
14 potential evidence, take photographs, you sketch the area.

15 Q. Did any of your training focus on evidence collection as  
16 well?

17 A. Yes, ma'am.

18 Q. And digital evidence collection?

19 A. Yes, ma'am.

20 Q. And what training focused on the collection of digital  
21 evidence?

22 A. Digital evidence also covered Advanced Crime Scenes. It's  
23 also mentioned in the Special Agent Laboratory course. We also cover

1 it in several of our Army courses like BNCOC and Warrant Officer  
2 Basic and Advanced. We also receive digital evidence training either  
3 I would say every other month from our local digital forensic  
4 examiner.

5 Q. What's the role of the local digital forensic examiner?

6 A. They conduct forensic examinations on the evidence that we  
7 collect.

8 Q. Are they CID agents as well?

9 A. Yes, ma'am.

10 Q. So how do you collect digital evidence, what have you  
11 learned?

12 A. Basically you remove the power source to the item and  
13 collect the item, take it into your physical custody.

14 Q. What about -- I'm sorry.

15 A. All right.

16 Q. What did you learn about the preservation of digital  
17 evidence?

18 A. So when an item is on say a monitor or a computer is  
19 running, what we do when we collect -- before we collect it, we  
20 determine whether the item is processing something, defragmenting or  
21 running some kind of deletion program. If that is the case, then we  
22 remove the power cord or the battery from the back of the device  
23 immediately. If it's not doing that, then we take a photograph of

1 the screen and then remove the power cord from the back or whatever  
2 power device.

3 Q. And then what do you do with the digital evidence when you  
4 collect it, what process do you follow?

5 A. We mark it with our time/date initials from the time we  
6 collect it and we document it on an evidence property custody  
7 document.

8 Q. And what's the evidence property custody document?

9 A. It is a document where we collect all items that we are  
10 determining if it's evidence or not.

11 Q. Just generally what does it contain, what information does  
12 it contain?

13 A. The top section of the document is administrative data, who  
14 you're collecting it from, where you are when you're collecting it.  
15 The center portion is the description, quantity, how many items there  
16 are, what is the item. You include serial numbers, any kind of  
17 damage or anything that's unique to that item. You also in there  
18 annotate how you collected it, say if you just physically marked on  
19 it with your time/date initials or if you place it into a container  
20 and mark it with time, date and initials. And then at the bottom  
21 portion of the document is the chain of custody.

22 Q. How does someone know when they're getting evidence that  
23 they're getting what they think they're getting?

1           A.    You can compare the actual piece of evidence to the  
2 description of the evidence on the evidence voucher.

3           Q.    Does that happen every time?

4           A.    Yes, ma'am. Unless it's sealed.

5           Q.    And how do you know it happens every time?

6           A.    It's part of the process and it's regulation.

7           Q.    How many cases have you tried as a CID -- or how many cases  
8 have you worked as a CID agent?

9           A.    Roughly, maybe a hundred a year.

10          Q.    So about, you said eight years you've been a CID agent?

11          A.    Yes, ma'am.

12          Q.    So about 800?

13          A.    Yes, ma'am.

14          Q.    And about how many computer crimes have you investigated?

15          A.    At least 15 a year, and every year that's progressively  
16 more.

17          Q.    And was there -- have you deployed to Iraq?

18          A.    Yes, ma'am.

19          Q.    Do you remember when that was?

20          A.    Yes.

21          Q.    Can you tell us when it was?

22          A.    From April 2010 through March of 2011.

23          Q.    So that was out of Fort Knox?

1           A.    Yes, ma'am.

2           Q.    Where were you stationed when you deployed?

3           A.    I was stationed -- I was assigned to the Baghdad CID office  
4 at Camp Liberty.

5           Q.    What was your position at Camp Liberty?

6           A.    I was a Senior Case Agent and the Assistant Special Agent  
7 in Charge.

8           Q.    What did you do as the Senior Case Agent and the Assistant  
9 Special Agent in Charge?

10          A.    As the Assistant Special Agent in Charge, anytime the SAC  
11 is out of the office you step in and assume the responsibility. As a  
12 Senior Case Agent you work cases just like anyone else.

13          Q.    Are you the most senior agent in the office?

14          A.    Yes, ma'am. With the exception of the SAC.

15          Q.    All right. How did you first become involved in this  
16 particular case?

17          A.    I was notified by the SAC on the morning of 27 May 2010, to  
18 report to our battalion regarding an allegation.

19          Q.    And what did you learn?

20          A.    There I learned we received information, our headquarters  
21 received information from the FBI that was from a non-government  
22 agency wherein their confidential informant had communication with

1 PFC Manning wherein he had related that he had obtained Secret  
2 documents for personal use.

3 Q. And did you receive any specific evidence?

4 A. Yes. They were chat logs.

5 Q. And did you look at those chat logs?

6 A. Yes, ma'am.

7 Q. Who was on those chat logs?

8 ADC[MAJ HURLEY]: Objection. Personal knowledge as to how is  
9 the Special Agent supposed to know that?

10 Q. Did you -- Did you ----

11 MJ: Hold on. Sustained.

12 Q. Did you verify -- So you said you found chat logs. Did you  
13 -- what did your office do once you received that information?

14 A. Upon receiving the chat logs we were able to corroborate as  
15 much information in there as we could as far as the details provided  
16 by PFC Manning to the source.

17 Q. Did you corroborate that information?

18 A. Yes, ma'am, there were several pieces that we were able to  
19 corroborate.

20 Q. What did you corroborate?

21 A. Basically most of his military information that he had  
22 mentioned in the chat logs. Some of his personal information that we



1 were able to obtain from social network sites that he had posted in  
2 both the network site and the chat logs.

3 Q. What did you do after reviewing this information?

4 A. I drafted an affidavit and went to the military magistrate  
5 for a search authorization.

6 Q. Did you get the authorization?

7 A. Yes, ma'am, I did.

8 Q. And do you remember what you got the authorization for?

9 A. I requested to seize his assigned work terminals and all of  
10 his personal computers or storage devices, media storage devices,  
11 electronic storage devices that were at FOB Hammer.

12 Q. And what did you do after you got the authorizations?

13 A. We gathered a team and we proceeded to FOB Hammer that  
14 night.

15 Q. What was the first thing that you did when you got to FOB  
16 Hammer?

17 A. First thing. We met with Staff Sergeant Bigelow and  
18 Captain Freeburg who was the HHC Commander and they escorted us to a  
19 location where we could designate our own, and then we briefed the  
20 chain of command on the FOB.

21 Q. Who traveled with you?

22 A. It was myself, Special Agent Tom Smith, Special Agent  
23 Jennie Lisclandri and Counterintel Special Agent Nathan Langley.

1 Q. What was your role in that team?

2 A. I was the Team Chief for the mission.

3 Q. What does that mean?

4 A. Supervisor.

5 Q. So you said you briefed the chain of command. Why did you

6 brief the chain of command?

7 A. Upon arrival we briefed the chain of command basically to

8 let them know what the allegation was, that we had obtained a search

9 authorization and we would be collecting certain items, and just to

10 let them know that we would be affecting their normal operations for

11 the next couple days.

12 Q. Do you remember what day that was?

13 A. That was on the evening of 27 May 2010.

14 Q. Where did you go first after you briefed the chain of

15 command, or where did you go after you designated your area you said?

16 A. After we designated our area was the chain of command.

17 Q. Okay and then where did you go after that?

18 A. From there we went to the S-2 section which was the SCIF

19 there on the TOC.

20 Q. What did you do at the SCIF?

21 A. There we began canvass interviews.

22 Q. And why did you start at the SCIF?

1           A.    Because that is the location that was most logical being  
2   that that's where PFC Manning was working at the time of the chat  
3   logs or at the time.

4           Q.    How did you know he was working there?

5           A.    Through his chain of command.

6           Q.    And who, just generally, who did you interview at the S-2?

7           A.    We conducted canvass interviews of the S-2 section.

8           Q.    And who in particular?

9           A.    Basically all the people that were on mid-shift there at  
10   the time we arrived, and then we slowly worked through the rest of  
11   the S-2 section, the day shift and the rest of the individuals.  
12   Also, we briefed the S-4 section or canvassed.

13          Q.    The S-4 section?

14          A.    Yes, ma'am.

15          Q.    Okay.  What was the rest of your team doing?

16          A.    Agent Smith was also conducting canvass interviews with me.  
17   Agent Langley was as well until he went with Agent Lisciandri.

18          Q.    And was there a time that you started processing the scene?

19          A.    Yes, ma'am.  During the canvass interview Agent Smith broke  
20   off from the canvasses and began processing the SCIF of the crime  
21   scene.

22          Q.    And what did -- do you know what he did to examine the  
23   crime scene?

1           A.    Well, because it was a SCIF there was Top Secret  
2 information on the wall so we had to do a little sanitizing, covering  
3 up the information on the walls and then began photographing.

4           Q.    Did he collect any evidence?

5           A.    Yes, he did.

6           Q.    And do you know what he collected?

7           A.    Yes, ma'am.

8           Q.    How do you know?

9           A.    Because I observed him do that.

10          Q.    What did he collect?

11          A.    He collected two SIPR terminals and one NIPR terminal.

12          Q.    And do you remember where he collected those items from?

13          A.    Yes, ma'am.

14          ATC[CPT OVERGAARD]: Ma'am, permission to publish Prosecution  
15 Exhibit 17?

16          MJ:   Go ahead.

17 [There was a pause while the assistant trial counsel published the  
18 exhibit onto the computer screen in the courtroom.]

19 **Questions by the assistant trial counsel [CPT OVERGAARD]:**

20          Q.    Are you familiar with this sketch?

21          A.    Yes, ma'am, I am.

22          Q.    And how are you familiar with this sketch?

1           A.    This is the rough sketch depicting the SCIF at FOB Hammer,  
2 and I also verified this piece of paper.

3           Q.    Okay. What does it mean to verify a sketch?

4           A.    It's accurate to the best of its ability.

5           Q.    Does this sketch accurately depict what was collected from  
6 the SCIF on 27 May?

7           A.    The locations, yes, ma'am.

8           Q.    Okay. And to your knowledge, did your team's collection of  
9 this evidence follow your regulations?

10          A.    Yes, ma'am.

11          Q.    And do you have any reason to believe that evidence  
12 suffered any damage or contamination?

13          A.    No, ma'am.

14          Q.    Do you know where the evidence was stored?

15          ADC[MAJ HURLEY]:   Ma'am, again, we would object as to the  
16 cumulative nature of this evidence. We've heard this.

17          MJ:   Why are we going through this again? Is there a reason?

18          ATC[CPT OVERGAARD]: We're quickly going over some of the first  
19 steps in her supervisory capacity, and Agent Graham was doing some  
20 different activities at the same time.

21          MJ:   Defense, are you going to have an objection that there's  
22 some taint in the evidence at the time the CID agent had it?

23          ADC[MAJ HURLEY]:   No, ma'am.

1 MJ: Move on.

2 ATC[CPT OVERGAARD]: May I have one moment please, ma'am?

3 MJ: Yes.

4 **Questions by the assistant trial counsel [CPT OVERGAARD]:**

5 Q. Agent Smith, you said that -- I'm sorry, Agent Graham, you  
6 said that you also talked to S-4 personnel. What is S-4?

7 A. The supply section, ma'am.

8 Q. And did you search the supply room?

9 A. I looked in the supply room, yes, ma'am.

10 Q. Why was that?

11 A. It was identified that there was additional pieces of  
12 possible evidence in the supply room.

13 Q. How did you know that?

14 A. With canvass interviewing Staff Sergeant Bigelow who was  
15 the supply room NCOIC. He had informed me that Agent [SIC] Manning  
16 was transferred over to that section and there were two terminals in  
17 that room which he had also been using in during a probably two week  
18 period of time.

19 Q. And did you collect any evidence from the supply room?

20 A. Yes, ma'am.

21 Q. And what did you collect?

1           A.    I collected the hard drive from the SIPR computer in the  
2 supply room and a hard drive from the NIPR computer in the supply  
3 room.

4           Q.    And what did you do with that evidence when you collected  
5 it?

6           A.    I collected it on an evidence property document and I  
7 placed them into an envelope.

8           Q.    And where did you take that evidence?

9           A.    To Agent Smith, transferred control over to him, and he  
10 placed them into the foot locker.

11          Q.    And who was responsible for the foot locker?

12          A.    Agent Smith.

13          Q.    Did everything you collect go into that foot locker?

14          A.    Yes, ma'am.

15          ATC[CPT OVERGAARD]: Nothing further, ma'am.

16          MJ: Cross.

17          ADC[MAJ HURLEY]:     Yes, ma'am.

18                                   **CROSS EXAMINATION**

19   **Questions by the assistant defense counsel [MAJ HURLEY]:**

20          Q.    Special Agent Graham, let's first talk about your  
21 interactions with PFC Manning. You saw PFC Manning on FOB Hammer?

22          A.    Yes, sir.

23          Q.    You saw him several times?

1       A.    At least two that I can recall off the top of my head.

2       Q.    Every time you saw him he was under escort?

3       A.    Technically, yes, yes, sir.

4       Q.    Thank you. But let's talk about the canvass interviews

5 that you conducted. Those canvass interviews you said you talked to

6 people from the S-2 section?

7       A.    Yes, sir.

8       Q.    And the S-4 section?

9       A.    Yes, sir.

10      Q.    And in interviewing generally, in all of your experience

11 and training, you will typically start an interview of whatever

12 length by identifying yourself?

13      A.    Yes, sir.

14      Q.    And identifying the topic generally that you're talking to

15 this person about?

16      A.    Depends, sir.

17      Q.    Well, in this particular case you had identified about

18 seven questions -- seven canvassing questions that you were going to

19 use?

20      A.    Right, to start off, yes, sir.

21      Q.    Right. And those canvassing questions all mentioned PFC

22 Manning by name, or a few of them certainly did?

23      A.    I'm sure a majority of them did.



1 Q. Now, you used a canvass interview to identify witnesses  
2 that you want to do more detailed interviews with?

3 A. Yes, sir.

4 Q. And the investigator that's conducting this is actually  
5 actively looking for information while doing it, or let's not speak  
6 in the third person. When you do these canvass interviews, you're  
7 actively looking for more information?

8 A. Yes, sir.

9 Q. And you're not stopping one from talking to you, are you?

10 A. No, sir.

11 Q. If they're telling you relevant information, you're going  
12 to take it all down and even ask follow-up questions?

13 A. Absolutely, sir, yes.

14 Q. So those questions, those seven questions that we talked  
15 about, those weren't all the questions you asked?

16 A. Not on every individual, but that was the probing questions  
17 that we began with every individual.

18 Q. Right. And you can recall identifying certain witnesses  
19 for follow-up?

20 A. Yes, sir.

21 Q. For instance, you did a follow-up interview with Captain  
22 Lim who was the OIC of the Brigade S-2 section?

23 A. I don't ----

1 Q. Don't know?

2 A. ---- know, sir. We didn't obtain a sworn statement from  
3 Captain Lim.

4 Q. Okay. What about Captain Freeburg, do you recall doing a  
5 more in-detail interview with him?

6 A. Yes, sir, but not because of the canvass interviews.

7 Q. And what about Sergeant Bigelow, was that because of the  
8 canvass interviews or did you -- first off, did you do a more  
9 detailed interview with Sergeant Bigelow?

10 A. Yes, sir, we did.

11 Q. And was that because of the canvass interviews?

12 A. No, sir. As part of the canvasses we did interview him,  
13 but we had identified him upon our immediate arrival that he was  
14 going to be someone we probably interview.

15 Q. So if a witness had told you they knew why PFC Manning  
16 disclosed information, you would have followed up on that?

17 A. Yes, sir.

18 Q. And as the senior person on the ground, you would expect  
19 another person conducting a canvass interview to relay that  
20 information to you?

21 A. Yes, sir.

22 Q. Let's talk about FOB Hammer. You were there for  
23 approximately five days, is that right?

1 A. I can't recall, but it was a couple of days, yes, sir.  
2 Q. About a week maybe?  
3 A. Maybe.  
4 Q. And this is in late May and early June of 2010?  
5 A. Yes, sir.  
6 Q. And do you recall any enemy activity on the FOB?  
7 A. Not at the time we were there, no, sir.  
8 Q. So no mortars that ----  
9 A. No, sir.  
10 Q. ---- that you can recall?  
11 A. Not that I recall.  
12 Q. Or small arms fire?  
13 A. No, sir.  
14 ADC[MAJ HURLEY]: Thanks, Special Agent Graham.  
15 WIT: Okay.  
16 MJ: Redirect.  
17 ATC[CPT OVERGAARD]: No, ma'am.  
18 MJ: All right. Temporary or permanent excusal?  
19 ATC[CPT OVERGAARD]: Temporary, ma'am.  
20 [The witness stood up to depart the courtroom.]  
21 MJ: Hold on. Government, do you want to confer?  
22 ATC[CPT OVERGAARD]: One moment, please, ma'am.  
23 No, ma'am. Temporary excusal.

1 MJ: All right. Temporary excusal.  
2 [The witness was temporarily excused, duly warned, and withdrew from  
3 the courtroom.]

4 MJ: Government, are ready to call your next witness?

5 ATC[CPT OVERGAARD]: Yes, ma'am. The United States calls  
6 specialist Eric Baker.

7 SPECIALIST ERIC BAKER, U.S. Army, was called as a witness for the  
8 prosecution, was sworn, and testified as follows:

9 DIRECT EXAMINATION

10 Questions by the assistant trial counsel [CPT OVERGAARD]:

11 Q. And you are Specialist Eric Baker?

12 A. Yes, ma'am, I am.

13 Q. What's your current unit, Specialist Baker?

14 A. My current unit is 411th MP Company at Fort Hood, Texas.

15 Q. What's your current position there?

16 A. Military Police Officer.

17 Q. How long have you been a Military Police Officer?

18 A. For five years.

19 Q. And how long have you been in the Army?

20 A. For five years, ma'am.

21 Q. Where were you assigned before you were at Fort Hood?

22 A. I was stationed at Fort Drum, New York, in the 2nd Brigade,  
23 10th Mountain.

1 Q. And when were you at Fort Drum?

2 A. From January, no from June of 2008 until August of 2012.

3 Q. And you were with 2-10 the whole time?

4 A. I went to 62nd MP Detachment in February of 2011, while I

5 was there.

6 Q. What's 62nd MP Detachment?

7 A. CID unit.

8 Q. It's CID? What do you do as an MP with CID?

9 A. For an MP is a Drug Suppression Team. I was an

10 investigator on the Drug Suppression Team over there.

11 Q. While you were at Fort Drum did you meet PFC Manning?

12 A. Yes, ma'am.

13 Q. And how did you meet him?

14 A. I met him when he first got there, when he first got to

15 Fort Drum, he was looking for somebody's Internet to use.

16 Q. Were you in the same unit?

17 A. Yes, ma'am. We were in the same company.

18 Q. In the same company. Do you remember when that was?

19 A. I don't remember the exact month, ma'am.

20 Q. Approximately.

21 A. No, not approximately.

22 Q. When he -- Do you remember when he arrived at the unit?

23 A. I think it was around June or July of 2008.

1 Q. 2008?

2 A. Yes, ma'am.

3 Q. And when do you -- when was the next time you remember  
4 seeing the -- PFC Manning?

5 A. The next time I seen him was the first Joint Readiness  
6 Training Center rotation at Fort Polk, Louisiana.

7 Q. So what's the Joint Readiness Training?

8 A. It's training for your deployment.

9 Q. And what training do you receive?

10 A. That one was geared towards Afghanistan at the time.

11 Q. Do you remember when that was?

12 A. Yes, ma'am. That was September of 2008.

13 Q. And you said the accused was there?

14 A. Yes, ma'am, he was.

15 Q. How do you know that?

16 A. We slept in the same building.

17 Q. Did he also attend the training?

18 A. Yes, ma'am, he did.

19 Q. Did your unit attend another JRTC training?

20 A. Yes, ma'am, we did.

21 Q. And do you remember when that was?

22 A. That one was September of '09.

23

1 Q. What did that training focus on?

2 A. That one was focused on Iraq, our deployment got changed to

3 Iraq.

4 Q. And was -- Was the accused also at that training?

5 A. Yes, ma'am, he was.

6 Q. How do you know that?

7 A. We slept in the same building again.

8 Q. Do you remember when you deployed? Do you remember what

9 month that was?

10 A. Yes, ma'am. It was October of 2009.

11 Q. And how long were you deployed for?

12 A. From October of 2009 till August of 2010.

13 Q. And did you go with the rest of your unit?

14 A. I was part of the advance, the torch party.

15 Q. Was that with 2-10?

16 A. Yes, ma'am.

17 Q. And what does it mean to be part of the torch party?

18 A. We flew before the rest of the unit started flying. We

19 arrived in Kuwait and we waited in Kuwait until the last group flew

20 out to Iraq and we flew with the last group.

21 Q. So how long was the rest of your unit in Kuwait?

22 A. I'd say about a week or two maybe at the most.

23 Q. When did you arrive in Iraq?

1 A. November of 2009.

2 Q. And how about the majority of 2-10, do you know when they  
3 arrived?

4 A. I think the end of October is when they should have been  
5 there.

6 Q. What was your interaction with the accused during the  
7 deployment?

8 A. He was my roommate.

9 Q. Was that for the entire time you were deployed?

10 A. Yes, ma'am, from about November until May of 2010.  
11 November of 2009 until about May of 2010.

12 Q. Okay. And you were roommate that whole time?

13 A. Yes, ma'am.

14 Q. How are roommates assigned?

15 A. Uhm, for the lower enlisted I guess it's assigned by the  
16 first sergeant.

17 Q. Okay. So you didn't choose your roommate?

18 A. No, ma'am.

19 Q. Was the accused in theater for the entire deployment?

20 A. Other than his leave, yes, ma'am.

21 Q. And do you remember when he went on leave?

22 A. Yes, ma'am. From the middle of January to I don't know  
23 exactly when he came back because I went two weeks after he left.



1 Q. How long is the amount usually, or how long were you usually  
2 on leave?

3 A. Usually for two weeks.

4 Q. Any travel time in there, too?

5 A. Yes, ma'am, travel time is added to that.

6 Q. So do you know approximately when he returned?

7 A. No, I do not.

8 Q. And when did you say you left?

9 A. I left the end of January.

10 Q. And he wasn't back yet?

11 A. No, ma'am.

12 Q. And when did you come back?

13 A. I came back the beginning -- the first week of March.

14 Q. So you were gone for the entire month of February and into  
15 March?

16 A. Yes, ma'am. I got stuck in Kuwait on the way back.

17 Q. Was the accused there when you returned?

18 A. Yes, ma'am, he was.

19 Q. What kind of -- where did you sleep when you were in Iraq?

20 A. I slept in a CHU.

21 Q. What's that?

22 A. It's like a basically like a trailer divided into three  
23 rooms.

1 Q. How did you divide your room with PFC Manning?

2 A. Our room was divided, my bed was by the door and his bed

3 was by the back wall. We had two night stands, and basically our

4 stuff on separate sides.

5 Q. Were you generally familiar with your roommate's belongings

6 while you were -- that he kept in the CHU?

7 A. I'd say familiar at least what was in there.

8 Q. And what kind of, do you remember what kind of -- do you

9 remember what kind of computer equipment he had?

10 A. Yes, ma'am.

11 Q. And what was it?

12 A. He had a Mac Book Pro, a hard drive, I remember an iPod

13 Touch, and a microphone with some headphones.

14 Q. And you remember seeing all those in your room?

15 A. Yes, ma'am.

16 Q. Was that for the entire deployment?

17 A. I'd say the hard drive I can't remember being there

18 afterwards.

19 Q. After what?

20 A. After his block leave.

21 Q. Okay. You remember the Mac Book there?

22 A. Yes, ma'am.

23 Q. And that was from November to May?

1           A.    Yes, ma'am.

2           Q.    Was there any -- Did your roommate keep any digital media  
3 in the CHU?

4           A.    I remember like the CDs laying around.

5           Q.    What kind of CDs?

6           A.    Like the blank CDs, like the standard CDs you'd get from  
7 your unit supply.

8           Q.    And how many did he have around?

9           A.    I'd say about two cases.

10          Q.    How many are in a case?

11          A.    Usually five.

12          Q.    And do you remember any particular time that you noticed  
13 those CDs around?

14          A.    I don't remember the exact time that I noticed it.

15          Q.    Were any of them labeled?

16          A.    No, ma'am.

17          Q.    And where were they -- Where were they usually kept or  
18 where were they kept?

19          A.    I think by the time I noticed them they were on like the  
20 night stand.

21          Q.    Did you ever use any of these discs?

22          A.    No, ma'am, I didn't.

1 Q. And did you ever ask your roommate why he had so many of  
2 these rewritable discs?

3 A. Yes, ma'am, I did.

4 Q. Why did you ask him that?

5 A. I just thought it was a little weird because he had an iPod  
6 and so I was kind of confused.

7 Q. What did he say when you asked him that?

8 A. He said they were to bring music into the SCIF because he  
9 couldn't take his iPod in there.

10 Q. Did you ever have any blank CDs in the CHU?

11 A. No.

12 Q. And did you ever see any blank CDs in the CHU marked  
13 Secret?

14 A. No, ma'am.

15 Q. Did you ever bring anything in the CHU marked Secret?

16 A. No, ma'am.

17 Q. And you mentioned a Mac Book Pro. Where did you say or did  
18 you say where he kept his laptop?

19 A. No, ma'am. His laptop was beside his bed on the, I guess  
20 on a laptop stand facing his bed.

21 Q. Did you ever use that laptop?

22 A. No, ma'am.

23 Q. How often was that laptop in your room?

1           A.    I'd say every day from the time -- from November from when  
2 I was there until May.

3           Q.    Did you ever see your roommate using it?

4           A.    Yes, ma'am.

5           Q.    How often did he use it?

6           A.    Pretty much daily.

7           Q.    And were you two on the same shift?

8           A.    Before both of us had went on our block leave we were on  
9 the same shift.

10          Q.    And how about after?

11          A.    After it got changed up a little bit.

12          Q.    So how did you know that he used it daily?

13          A.    Because beforehand we'd be on the same shift, pretty much  
14 use it I guess until he was going to sleep, and I'd say a few times  
15 like I'd wake up and he'd still be on it.

16          Q.    Did you ever see what he was doing on that computer?

17          A.    No, ma'am.

18          Q.    What did your roommate do in his spare time?

19          A.    Used his computer, asked me to go to the AAFES trailer,  
20 usually I see him sometimes at the smoke pit.

21          Q.    Did your roommate send a lot of packages?

22          A.    I wouldn't say sending a lot like -- how do you mean,  
23 ma'am, send a lot?

1 Q. Was there ever a time when you noticed that he sent  
2 numerous packages?

3 A. Yes, ma'am. It was only once though.

4 Q. Okay. So one time. How many did you notice?

5 A. I don't remember how many he sent.

6 Q. Less than five?

7 A. Yeah, I'd say probably about less than five.

8 Q. And do you remember when that was?

9 A. The end of April.

10 Q. How do you remember that?

11 A. Because everybody thought we were going home kind of early,  
12 usually everybody will send packages around the same time.

13 Q. Did you ever see any books about computers in your room?

14 A. Not until after his belongings were taken out of the room.

15 Q. Okay. Were they -- so you did see books?

16 A. Yes, ma'am.

17 Q. Were they, they were his books?

18 A. I'd assume so.

19 Q. Were they yours?

20 A. No, ma'am.

21 Q. Were they in your room?

22 A. Yes, ma'am.

23 Q. What kind of books did you see?

1       A.    Like Net Plus, C Plus and like Linux.

2       Q.    And what are those, do you know?

3       A.    Like hardware and software books.

4       Q.    When were you first contacted by CID for this particular  
5 case?

6       A.    I guess the day they came and searched our room.

7       Q.    Can you tell us about that?

8       A.    Yes, ma'am. They came, they asked me to point out like  
9 which side was mine, what stuff was mine and what stuff was not mine.

10      Q.    And what did you tell them?

11      A.    I told them everything on the left side of the room, on the  
12 left -- to on the left -- on the left of the night stand was mine,  
13 and everything on the right side was his.

14      Q.    Did the agents take any of your property?

15      A.    No, ma'am, they didn't.

16      CDC[MR. COOMBS]:   Your Honor, at this point the defense would  
17 stipulate that the items seized by the agents were my client's items  
18 and not the witness's items.

19      MJ:   All right.

20      ATC[CPT OVERGAARD]: Can I have a -- Can we have a quick recess  
21 in place?

22      MJ:   Certainly.

23      [There was a pause in the proceedings.]

1 ATC[CPT OVERGAARD]: No further questions, ma'am.

2 Thank you.

3 MJ: All right. Cross-examination.

4 CDC[MR. COOMBS]: Yes, Your Honor.

5 **CROSS-EXAMINATION**

6 **Questions by the civilian defense counsel [MR. COOMBS]:**

7 Q. Specialist Baker, how are you?

8 A. I'm doing all right, sir.

9 Q. Good. I just have a few questions for you. You indicated  
10 that you were one of the last individuals to leave Kuwait and then  
11 get to Iraq. Is that correct?

12 A. Yes, sir.

13 Q. And when you arrived, you were also one of the last people  
14 to get a roommate?

15 A. Yes, sir.

16 Q. And at the time you were assigned by the first sergeant to  
17 be PFC Manning's roommate?

18 A. Yes, sir.

19 Q. Because he was one of the last people who didn't have a  
20 roommate?

21 A. Yes, sir.

22



1 Q. Now, even though you're roommates, it's fair to say that  
2 you and PFC Manning weren't friends?

3 A. Yes, sir, it's fair to say.

4 Q. The two of you really didn't hang out?

5 A. No, sir, we didn't.

6 Q. Didn't have much in common?

7 A. No, sir.

8 Q. And the two of you really didn't talk very much?

9 A. No, sir.

10 Q. You talked about some of the observations on direct of  
11 seeing where PFC Manning would go and what he would do. Is it fair  
12 to say that you didn't really see him hang out with too many people?

13 A. No, sir, I didn't.

14 Q. In fact, if he wasn't in his room on the computer, he was  
15 in the smoke pit. Is that correct?

16 A. Yes, sir, I would say that.

17 Q. And when he was in the smoke pit he was by himself?

18 A. Yes, sir, he was.

19 Q. And if he wasn't in the smoke pit or on his computer in his  
20 room, he was going to the PX, right?

21 A. Yes, sir.

22 Q. And, again, going by himself?

23 A. Yes, sir.

1 Q. You said a couple times that you would wake up and you  
2 would see him on the computer?

3 A. Yes, sir.

4 Q. And he was essentially just typing?

5 A. I don't remember exactly. I mean sometimes I just assume  
6 like he was chatting with somebody, so I just really didn't pay  
7 attention.

8 Q. So you saw him, what you thought was he was chatting with  
9 somebody?

10 A. Yes, sir.

11 Q. And from your observations, PFC Manning seemed to spend most  
12 of his time on the computer?

13 A. Yes, sir.

14 Q. That seemed to be the main source of friendship that he had  
15 there?

16 A. Yes, sir.

17 Q. You talked about some items being sent back in April. Is  
18 that correct?

19 A. Yes, sir.

20 Q. And that was basically because everyone kind of thought  
21 maybe we're going to go back in April, right?

22 A. Yes, sir.

1 Q. And people, not uncommon to pack up items you don't want to  
2 lug all the way back with you, you want to ship them back?

3 A. Yes, sir.

4 CDC[MR. COOMBS]: Thank you, Specialist Baker.

5 MJ: Redirect?

6 ATC[CPT OVERGAARD]: No, ma'am.

7 MJ: Temporary or permanent excusal?

8 ATC[CPT OVERGAARD]: Temporary, ma'am.

9 MJ: All right.

10 **[The witness was temporarily excused, duly warned, and withdrew from**  
11 **the courtroom.]**

12 MJ: For the record, although the government asked for a recess  
13 in place the court never recessed the court so I never called the  
14 called the court back to order.

15 ATC[CPT OVERGAARD]: Your Honor, at this time the United States  
16 has a stipulation of expected testimony of Sergeant Mary Amiatu.

17 MJ: All right. Do you want to publish it?

18 ATC[CPT OVERGAARD]: Yes, ma'am.

19 MJ: Go ahead.

20 ATC[CPT OVERGAARD]: It is hereby agreed by the accused, defense  
21 counsel, and trial counsel that if Sergeant Mary Amiatu were present  
22 to testify during the merits and presentencing phases of this court-  
23 martial she would testify substantially as follows:

1 I am currently the S-1 NCO for the 6th Engineer Battalion at Fort  
2 Richardson, Alaska. I've held this position for two months.  
3 Previously I was the Strength Accounting Clerk for U.S. Army Central  
4 Command, G1 at Camp Arifjan, Kuwait. I held that position from  
5 October of 2011 until October of 2012. In that position I helped  
6 account for personnel coming in and out of theater, moving from place  
7 to place within theater and changing duty status. I provided battle  
8 management update briefs and worked with the Deployed Theater  
9 Accounting System, DTAS. I also worked with the Joint Asset Movement  
10 Management System, JAMMS.

11 With regard to this particular investigation, I provided  
12 investigators from the Army Criminal Investigation Command, CID, a  
13 printout from JAMMS on PFC Manning. JAMMS is a system that captures  
14 movement and location information about operating forces, government  
15 civil servants, and government contractors through data collection  
16 points established in specified operational theaters. These  
17 collection points are, for example, dining facilities, points of  
18 debarkation, and fuel points. Operational theaters include Kuwait,  
19 Afghanistan and Iraq. As such, JAMMS would capture the dates on  
20 which PFC Manning scanned himself in and out of the Department of  
21 Defense, DoD, facilities using his CAC card such as dining  
22 facilities, DFACs, and points of debarkation into and out of Iraq,  
23 APOD/SPOD. When providing this report I also signed and notarized an

1 attestation certificate identified as Bates Number 00412522 regarding  
2 the authenticity of the information.

3           As a former Strength Accounting Clerk I am familiar with  
4 JAMMS reports. I've read them before. I therefore understand this  
5 JAMMS report I provided identified as Bates numbers 00412523, through  
6 00412532 to show that the Servicemember named Manning, Bradley, whose  
7 last four Social Security digits are [REDACTED] came into and out of Iraq  
8 several times. For example, on Page 9 of this document it shows that  
9 on 26 October 2010, PFC Manning signed into the DFAC on Camp Beuring  
10 in Kuwait, but by 28 October 2010 was using the DFAC in Iraq. Page 8  
11 shows Bradley Manning departed Iraq on 28 January 2010, and then  
12 entered again via Kuwait on 11 February 2010.

13           I'm going to repeat that sentence, ma'am, in case I read it  
14 wrong.

15           Page 8 shows Bradley Manning departed Iraq on 22 January  
16 2010, and then departed again via Kuwait on 11 February 2010. Gaps  
17 like this are normal when a Soldier leaves a deployed environment  
18 such as for mid-tour leave. Page 8 shows further that PFC Manning  
19 was using the FOB Hammer by 14 February 2010.  
20 Lastly, page one showed that PFC Manning boarded an outbound flight  
21 from Iraq on 30 May 2010.

1           And based on this stipulation, the government would like to  
2 offer what's been marked for Identification -- as PE 22 for  
3 Identification PE 22, ma'am.

4           ADC[MAJ HURLEY]:     No objection, Your Honor.

5           MJ: May I see it, please? Prosecution Exhibit 22 for  
6 Identification is admitted.

7           Government, are you ready to call your next witness or do  
8 we need a recess?

9           TC[MAJ FEIN]: Your Honor, the United States requests a 15-  
10 minute recess and a brief 802.

11          MJ: All right.     Any objection?

12          CDC[MR. COOMBS]:   No objection, Your Honor.

13          MJ: Court is in recess then until 1635 or 4:35.

14          **[The court-martial recessed at 1626, 3 June 2013.]**

15          **[The court-martial was called to order at 1646, 3 June 2013.]**

16          MJ: Court is called to order. Let the record reflect all  
17 parties present when the court last recessed are again present in  
18 court.

19          Is the government ready to proceed?

20          ATC[CPT MORROW]:   Yes, Your Honor. Stipulation of Expected  
21 Testimony for Special Agent Calder Robertson.

22          It is hereby agreed by the accused, defense counsel, and  
23 trial counsel that if Special Agent Calder Robertson were present to

1 testify during the merits and presentencing phases of this court-  
2 martial he would testify substantially as follows:

3 I am a Special Agent for the Computer Crime Investigative  
4 Unit, CCIU, of the U.S. Army Criminal Investigation Command, CID.

5 I have been with CCIU since March 2006. In February 2010 I  
6 became the Special Agent in Charge, S-A-C, of the Europe brand --  
7 Europe Branch Office of CCIU. In my current capacity I am  
8 responsible for conducting and overseeing the conduct of large-scale  
9 complex criminal investigations associated with high technology,  
10 including insider threat and computer intrusions into the critical  
11 information architecture of the United States Army.

12 Among other things, this work includes conducting  
13 interviews, executing search warrants, processing crime scenes,  
14 collecting and handling physical evidence, obtaining forensic images  
15 of digital evidence, conducting forensic examinations and preparing  
16 comprehensive reports for supported officials and prosecutors.

17 I have testified several times in judicial proceedings.  
18 Because I am in charge of the Europe Branch Office of CCIU, I have  
19 responsibility for investigating cybercrime incidents in Europe and  
20 Africa as well as providing rapid response to southwest Asia, Iraq  
21 and Afghanistan.

22 Additionally, I was recently selected to establish the  
23 Pacific branch office of CCIU with responsibility for investigating

1 U.S. Army cybercrime in the Pacific Area of Operation. In April 1998  
2 to November of 2003 I held a variety of other positions within CID  
3 and was responsible for investigating criminal offenses with an Army  
4 nexus.

5 I received a bachelor's of science, BS, in psychology in  
6 2006 and have been a certified computer crime investigator through  
7 the Defense Cyber Crime Center, DC3, since 2007. In 2010 I was  
8 awarded the U.S. Army Achievement Medal for distinguished civilian  
9 service as a civilian special agent for Army CID. I received  
10 numerous other awards in my civilian and military capacities.

11 I have received extensive training from the Defense Cyber  
12 Investigation Training Academy, DCITA, D-C-I-T-A, which is part of  
13 DC3. Through DCITA I have attended the following courses relevant to  
14 my current work: Live Network Investigations, 2009; Mobile  
15 Electronics Forensics Training, 2008; Advanced Log Analysis, 2008;  
16 Forensics and Intrusions in a Windows Environment, 2007; Macintosh  
17 Forensic Examinations, 2007; Wireless Technology, 2007; Windows  
18 Forensic Examinations with EnCase, 2007; Introduction to Networks and  
19 Computer Hardware, 2006; and Introduction to Computer Search and  
20 Seizure, 1999.

21 Additionally, I attended Computer Forensics 2 with EnCase  
22 in 2009, a course put on by Guidant Software, the makers of EnCase.  
23 In 2011 I also attended DCITAs Large Data Set Acquisition Course as



1 well as the Army Criminal Investigation Laboratory's Evidence  
2 Management Certification Course. These courses focus on the  
3 collection and handling of physical and digital evidence.

4           On 27 May 2010, I became involved with the investigation of  
5 PFC Bradley Manning after receiving preliminary information on  
6 misconduct that required downrange investigation. As the S-A-C,  
7 Special Agent in Charge of the Europe Branch Office of CCIU and the  
8 closest CCIU agent to Iraq, I was tasked by CCIU Headquarters then at  
9 Fort Belvoir, Virginia to provide support to the Camp Liberty CID  
10 Office. I traveled to Camp Liberty in Baghdad and stayed there for  
11 three days at the end of May 2010. I stayed at Camp Liberty because  
12 at that time it was too dangerous to travel to FOB Hammer, F-O-B  
13 Hammer. Additionally, the evidence collection team already at the  
14 crime scene on FOB Hammer had sufficient personnel to complete their  
15 mission such that my physical presence was unnecessary. My role in  
16 the investigation was to assess and provide expert assistance with  
17 the collection, preservation and the imaging of computer evidence, as  
18 well as to perform preliminary analysis of the digital evidence. A  
19 preliminary forensic examination is a brief review taking no more  
20 than a couple of hours, whereas a full forensic examination may take  
21 anywhere from an entire day to several -- several -- several weeks  
22 depending on the amount of recoverable information.

1           I conducted preliminary forensic examinations on a number  
2 of items of evidence seized in this case. Evidence collected from  
3 FOB Hammer and delivered to me at Camp Liberty included two supply  
4 annex computers, a re-writable CD, an Apple brand personal laptop, an  
5 external hard disk drive and three Sensitive Compartmented  
6 Information facility, SCIF, computers.

7           I follow several general procedures when handling evidence.  
8 I review the custody document and always insure that the description  
9 of the evidence matches the evidence attached. I check, for example,  
10 the recorded serial numbers, markings for identification, and  
11 condition description match the associated evidence. I insure that  
12 the necessary information such as date and time are properly and  
13 accurately recorded. Lastly, I maintain secure custody of the  
14 evidence prior to transferring it to another individual. In addition  
15 to following these procedures, when transferring to or receiving  
16 evidence from another person I am also sure to properly sign, date  
17 and note the reason for the transfer.

18           With regard to each item of physical evidence I received in  
19 this case, I followed these same procedures. When receiving whole  
20 computers I also checked to insure they did not contain any  
21 suspicious hardware or removable data storage devices such as SD  
22 cards and thumb drives.

1           Prior to powering on or accessing the contents of any  
2 device I image each item of physical evidence I received in order to  
3 preserve the contents of the data on the item. If a forensic image  
4 on an item of digital media is an exact bit for bit copy of the data  
5 on the digital media. I image these items of evidence so that the  
6 data on the device can be forensically examined without manipulating  
7 the data contained on the original evidence. This is standard  
8 practice by digital forensic examiners. The software forensic  
9 examiners use to image the digital evidence has built in procedures  
10 to verify that the item has been successfully duplicated. For  
11 example, the program will note the MD5, that's Mike Delta five hash,  
12 or Secure Hash Algorithm 1, SHA1, hash value of an item of digital  
13 evidence before imaging acquisition hash value and after imaging the  
14 item verification hash value. If the two hash values match, the item  
15 has been successfully duplicated bit for bit. The hash value is  
16 determined by mathematical algorithm and is displayed as a number  
17 letter identifier unique to every item of electronically stored  
18 information. It is similar to a digital fingerprint, although more  
19 unique. When the hash value is generated, the entire hard drive will  
20 have a hash value as well as each individual file on the hard drive.  
21 If there is any alteration to the hard drive or to any file on the  
22 hard drive, the acquisition and verification hash values will not  
23 match. The alteration can be as small as adding a single space into

1 a text document, or saving a file in a different format, i.e., saving  
2 a .Doc as a .PDF. In this case I used EnCase forensic software to  
3 complete this imaging process. EnCase forensic software is widely  
4 used by digital forensic examination -- examiners. As I stated  
5 earlier, I have received training on EnCase forensic software and  
6 have used it in my other cases involving digital forensic  
7 examinations. I encountered no errors while conducting the imaging  
8 of the evidence at issue in this case.

9           Between 30 May 2010 and 1 June 2010, I processed the  
10 following items of physical evidence: I processed a Hitachi brand  
11 laptop computer with the serial number 070817DP0C10DSG2J1DP, which  
12 was collected from the supply office or annex, 2nd Brigade Combat  
13 Team 10th Mountain Division, FOB Hammer, Iraq. This computer was  
14 marked Unclassified and was seized because PFC Manning had  
15 temporarily worked in the supply office in May 2010 and used this  
16 computer. I received this evidence from Special Agent Thomas Smith.  
17 I followed proper evidence handling procedures to receive and handle  
18 this evidence and made sure the evidence matched its noted  
19 description before beginning work. Upon taking possession I unsealed  
20 this computer and obtained an EnCase forensic image of the hard drive  
21 contained within this computer. The resulting forensic image with  
22 the SHA1 hash value of 309DF99F068FBA2E81AAE03DLA93D471CDE90BF0 was  
23 verified to be an exact bit for bit copy of the hard drive through a

1 comparison of the acquisition and verification hash values. I did  
2 not examine this image further. I reviewed DN073-10 in preparation  
3 for this case. This item's forensic image is located on Item 1 of  
4 DN073-10. I know this because I collected item one as evidence.

5           B. I processed a Seagate brand computer hard drive with  
6 the serial number CN-OMN922-21232-793-002L2 which was collected from  
7 the supply office annex, 2nd Brigade Combat Team, 10th Mountain  
8 Division, FOB Hammer, Iraq. This computer was collected to the  
9 SIPRNET and the hard drive was seized because PFC Manning had  
10 temporarily worked in the supply office in May 2010 and used this  
11 computer. I received this evidence from Special Agent Smith. I  
12 followed proper evidence handling procedures to receive and handle  
13 this evidence and made sure the evidence matched its noted  
14 description before beginning work. Upon taking possession I unsealed  
15 this hard drive and obtained an EnCase forensic image of the hard  
16 drive. The resulting forensic image with the SHA1 hash value of  
17 CF6D703F0023773EB9E30EEB318660AC0D18F404 was verified to be an exact  
18 bit for bit copy of the hard drive through a comparison of the  
19 acquisition and verification hash values. I did not examine this  
20 image further. I reviewed DN-073-10 in preparation for this case.  
21 This item's forensic image is located on Item 2 of DN-073-10. I know  
22 this because I collected Item 2 as evidence.

1           C. I processed a rewritable compact disk CD-RW with the  
2 serial number LD623MJ04184038B16 which was collected from the  
3 quarters of PFC Manning, Room 4C93, LSA Dragon, FOB Hammer, Iraq. A  
4 CD-RW is different from a commercially produced CD with content  
5 already loaded on to it, i.e., from a music store, because a CD-RW  
6 allows the user to write content to the CD along with edit and delete  
7 information on the CD. This CD-RW had a Secret sticker on it and was  
8 labeled, "12 July, JUL, 07, CZ, Engagement Zone, 30 GC". This CD-RW  
9 was collected with three Arabic language CDs in a multi disk case. I  
10 received this evidence from Special Agent Smith. I followed proper  
11 evidence handling procedures to receive and handle this evidence and  
12 made sure the evidence matched its noted description before beginning  
13 work. Upon taking possession I unsealed the multi disk case and took  
14 an EnCase forensic image of the aforementioned CD-RW. The resulting  
15 forensic image with the MD5 hash value of  
16 5C993EE621B036482BAE1353F844322F was verified to be an exact bit for  
17 bit copy of the CD-RW through a comparison of the acquisition and  
18 verification hash values. After imaging this CD-RW, I conducted a  
19 preliminary forensic examination of this image. The CD-RW contained  
20 two files with identical names. One file contained no data and the  
21 other file, 12GUL07CG21 Engagement Zone 30GC contained a video. The  
22 video appeared to have been burned to the disk on 27 April 2010 using  
23 Macintosh disk creation software. I reviewed DN073-10 in preparation

1 for this case. This item's forensic image is located on Item 2 of  
2 DN073-10. I know this because I collected Item 2 as evidence.

3 D. I processed an Apple brand laptop computer with the  
4 serial number W8939AZ066E which was collected from the quarters of  
5 PFC Manning, Room 4C93, LSA Dragon, FOB Hammer, Iraq. I received  
6 this evidence from Special Agent Smith. I followed proper evidence  
7 handling procedures through and received this evidence and made sure  
8 the evidence matched its noted description before beginning work.  
9 Upon taking possession, I unsealed the Macintosh computer and removed  
10 a Fujitsu brand hard drive from the laptop and obtained an EnCase  
11 forensic image of the hard drive. The serial number of the hard  
12 drive was K94DT9829WPY. The resulting forensic image of the hard  
13 drive I obtained from this computer with the SHA1 hash value of  
14 3CF107DB8B3865A5E2BFCE400BAE1DA9691FB49 was verified to be an exact  
15 bit for bit copy of the hard drive through a comparison of  
16 acquisition and verification hash values. Thereafter, I conducted a  
17 preliminary forensic examination of this image. I determined that  
18 the hard drive had a Macintosh operating system installed and had a  
19 user account resembling PFC Manning's name, although I did not note  
20 the machine's user name in my analyst investigative report, AIR. A  
21 review of the device logs contained on the hard drive revealed some  
22 form of optical disk IE: CD-RW drive activity occurred, like  
23 deleting or burning CD-RW on or around 27 April 2010. I also

1 reviewed the user files associated with the account resembling PFC  
2 Manning's name and located several names containing text that was  
3 specifically referenced in the chat logs received by US Army CID  
4 during the initial phases of the investigation. Though I did not  
5 specifically note which text was referenced in the chat logs in my  
6 AIR. I reviewed DN073-10 in preparation for this case. This item's  
7 forensic image is located on Item 1 of DN073-1010. I know this  
8 because I collected Item 1 as evidence.

9           E. I processed a Seagate brand external hard disk drive,  
10 HDD, with the serial number 2GEWJKLJ, which was collected from the  
11 quarters of PFC Manning, Room 4C93, LSA Dragon, FOB Hammer, Iraq. I  
12 received this evidence from Special Agent Smith. I followed proper  
13 evidence handling procedures to receive and handle this evidence and  
14 made sure the evidence matched its noted description before beginning  
15 work. Upon taking possession I unsealed the external hard disk drive  
16 case and further removed the internal hard disk drive, also Seagate  
17 brand, serial number 9BS-1S-2TZ. Because I did not have a power  
18 adapter that could safely and reliably power the Seagate external  
19 hard disc drive. I then obtained an EnCase forensic image of the  
20 internal Seagate drive with the SHA1 hash value of  
21 151183463C5B5841A8115627BF51E8D9E74ABB48. Resulting forensic image  
22 was verified to be an exact bit for bit copy of the Seagate hard disk  
23 drive through a comparison of the acquisition and verification hash



1 values. After imaging the Seagate hard disk drive I conducted a  
2 preliminary forensic investigation of this image. I found a file  
3 containing the contact information of a member of the WikiLeaks team,  
4 Mr. Julian Assange. This contact information appeared to have been  
5 produced and released by the WikiLeaks team and did not appear to be  
6 of a personal nature. I reviewed DN073-10 in preparation for this  
7 case. This item's forensic image is located on Item 1 of DN073-10.  
8 I know this because I collected item one as evidence.

9 I processed an Alienware brand laptop computer with the  
10 serial number NKD900TA6D00661 which was collected from the Sensitive  
11 Compartmented Information Facility, SCIF, of the 2nd Brigade Combat  
12 Team, 10th Mountain Division, FOB Hammer, Iraq. This computer was  
13 connected to the SIPRNET and the hard drive was seized because PFC  
14 Manning had worked in the SCIF in November of 2009 to May 2010 and  
15 used this computer. I received this evidence from Special Agent  
16 Smith. I followed proper evidence handling procedures to receive and  
17 handle this evidence and made sure the evidence matched its noted  
18 description before beginning work. Upon taking possession I unsealed  
19 the Alienware laptop computer, removed the Seagate brand hard drive  
20 from the laptop and obtained an EnCase forensic image of the hard  
21 drive. The serial number of the hard drive was 3MH036M1. The  
22 resulting forensic image of the hard drive I obtained from this  
23 computer with the SHA1 hash value of

1 C7400FBED0B4DB68A582A585EEAA34AB1A62CD64 was verified to be an exact  
2 bit for bit copy of the hard drive through a comparison of the  
3 acquisition and verification hash values. Thereafter, I conducted a  
4 preliminary forensic examination of this image. I determined that PFC  
5 Manning had a user account on this laptop. I found several items of  
6 interest to this investigation including copies of the Apache video  
7 made publicly available by WikiLeaks and called collateral murder. I  
8 also found an archive file that contained approximately 11,000  
9 sensitive and classified documents downloaded in hypertext markup  
10 languages, HTML format. Though I did not note the exact number. I  
11 reviewed DN-073-10 in preparation for this case. This item's  
12 forensic image is located on Item 2 of DN073-10. I know this because  
13 I collected Item 2 as evidence.

14 I processed a Dell brand laptop computer with the serial  
15 number HLBJQF1 which was collected from the Sensitive Compartmented  
16 Information Facility, SCIF, of the 2nd Brigade Combat Team, 10th  
17 Mountain Division, FOB Hammer. This computer was connected in the  
18 SIPRNET and was seized because PFC Manning had worked in the SCIF in  
19 November 2009 to May 2010 and used this computer. I received this  
20 evidence from Special Agent Smith. I followed proper evidence  
21 handling procedures to receive and handle this evidence and made sure  
22 the evidence matched its noted description before beginning work.  
23 Upon taking possession, I unsealed the Dell laptop computer, removed

1 an unknown brand hard drive from the laptop and obtained an EnCase  
2 forensic image of the hard drive. The serial number of the hard  
3 drive was 5MH0HWK9. The resulting forensic image of the hard drive I  
4 obtained from this computer with the SHA1 hash value of  
5 C3473C3DF1D131E0022F0C56BSC46087E9D5150F was verified to be an exact  
6 bit for bit copy of the hard drive through a comparison of the  
7 acquisition and verification hash values. Thereafter, I conducted a  
8 preliminary forensic examination of this image. I determined that  
9 PFC Manning had a user account on this laptop computer. I reviewed  
10 DN073-10 in preparation for this case. This item's forensic image is  
11 located on Item 2 of DN073-10. I know this because I collected Item  
12 2 as evidence.

13 I processed a Dell brand laptop computer with the serial  
14 number 93H4QD1 which was collected from the Sensitive Compartmented  
15 Information Facility, SCIF, of the 2nd Brigade Combat Team, 10th  
16 Mountain Division, FOB Hammer Iraq. This NIPR net laptop had been  
17 located near the work area of PFC Manning. I received this evidence  
18 from Special Agent Smith. I followed proper evidence handling  
19 procedures to receive and handle this evidence and made sure the  
20 evidence matched its noted description before begin beginning work.  
21 Upon taking possession I unsealed the Dell laptop computer, removed  
22 an unknown brand hard drive from the laptop and obtained an EnCase  
23 forensic image of the hard drive. The serial number of the hard

1 drive was 5MH0TB78. The resulting forensic image of the hard drive I  
2 obtained from this computer with the SHA1 hash value of  
3 E2B49BD3ED0E2F5D798AB44FEBAAC3B15D0070DE was verified to be an exact  
4 bit for bit copy of the hard drive through a comparison of the  
5 acquisition and verification hash values. I did not examine this  
6 image further. I reviewed DN073-10 in preparation for this case.  
7 This item's forensic image is located on Item 1 of DN0973-2. I know  
8 this because I collected item one as evidence.

9           As I stated earlier, I used the EnCase forensic software to  
10 obtain images of each item of evidence I processed. In this case, I  
11 attached each device except the CD-RW to a write blocker and then  
12 attached the write blocker to my laptop computer which had the EnCase  
13 forensic software loaded. A write blocker is a device that allows  
14 you to acquire information on an item of digital media without  
15 accidentally damaging or the contents of the original digital media.  
16 In short, the write blocker insures that none of the original data on  
17 the item of evidence is manipulated in any way. I did not use the  
18 write blocker when processing the CD -- CD-RW as that device was not  
19 at risk of alteration. Computers do not alter data on CD-RWs without  
20 specific instructions to do so. As I neither intended nor actually  
21 issued such instructions, there was no need to use a write blocker  
22 with regards to the CD-RW. After securing the write blocker as  
23 appropriate, I then used EnCase to create a forensic image of each

1 item. As I stated earlier, EnCase creates an acquisition hash value  
2 that is later compared to the verification hash value once the item -  
3 - once the image has been created. I saved the forensic images of  
4 each device I processed on to sterile hard drives. I later  
5 transferred these forensic images to the hard drives recorded as  
6 Items 1 and 2 on DN073-10. The forensic image is not altered by being  
7 transferred between storage devices. When you open the forensic  
8 image in EnCase, EnCase itself verifies that the forensic image is a  
9 true copy.

10 Item 1 of DN073-10, serial number 9VS-25G5M, is a Seagate  
11 brand hard disk drive containing the individual forensic images of  
12 the devices listed above that were initially determined to be  
13 Unclassified. Item 2 of DN073-10, serial number 5BG1826C, is a  
14 Seagate brand hard disk drive containing the individual forensic  
15 images of the devices listed above that were initially determined to  
16 be classified Secret.

17 On 5 June 2010, I collected Items 1 and 2 as evidence  
18 because I had previously transferred the forensic images of the  
19 various devices I processed to these two hard disk drives. I  
20 collected this evidence at the CID office on Camp Liberty. I did  
21 this to consolidate the evidence I processed for ease of review by  
22 subsequent forensic examiners. This process is consistent with best  
23 forensic computer practices in the forensic community. It is common

1 for investigators to consolidate the forensic images of multiple  
2 devices on one hard drive and then collect the resulting hard drive  
3 as evidence. After I collected Items 1 and 2 as evidence, I  
4 transferred custody of this evidence to Special Agent Jeremy Drews.

5 During the above forensic examinations I recorded my notes,  
6 including my description of the evidence and their associated hash  
7 values on a AIR dated 5 June 2010, and marked for this court-martial  
8 with Bates Numbers 00121674 through 00021683. This AIR accompanied  
9 the evidence I transferred to Special Agent Drews. The Prosecution  
10 Exhibit 11 for Identification is a Seagate brand hard disk drive with  
11 a serial number 9BS-25G5M, Item 1 of DN073-10. Prosecution Exhibit  
12 12 for Identification is a Seagate brand hard disk drive with serial  
13 number 5BG1826C, Item 2 of DN073-10.

14 TC[MAJ FEIN]: May we have a moment, Your Honor? Ma'am, just to  
15 save seven pages worth of stipulation being read onto the record, on  
16 Page 5 of the written stipulation, Your Honor, serial number was  
17 given for the Dell brand laptop computer with the serial number  
18 HLVJQF1, and of the enclosed hard drive the serial number had it  
19 numbers transposed. The actual serial number according to Special  
20 Agent Robertson's proffer of testimony is 5MHOHWKN.

21 MJ: Does the written stipulation of expected testimony that's  
22 been already admitted, have the proper serial numbers?

23 TC[MAJ FEIN]: It does, Your Honor.

1 MJ: Government, anything further?

2 TC[MAJ FEIN]: Yes, Your Honor, the United States moves to admit  
3 Prosecution Exhibit 11 for Identification and Prosecution Exhibit 12  
4 for Identification.

5 MJ: Those are the two hard drives ----

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: ---- represented in the stipulation?

8 MJ: Any objection?

9 CDC[MR. COOMBS]: No, ma'am.

10 MJ: Prosecution Exhibits 11 and 12 for Identification are  
11 admitted. And I'm going to hand these back to the court reporter.  
12 All right. Does the government have anything further to go forward  
13 with today? We spoke earlier, the parties came back for a brief  
14 R.C.M. 802 conference and I believe it was the understanding of the  
15 parties that the next witness might be lengthy so starting him today  
16 was not be a good idea.

17 TC[MAJ FEIN]: Yes, ma'am. The United States intends to call  
18 Special Agent Shaver tomorrow morning first thing.

19 MJ: All right. Any objection?

20 CDC[MR. COOMBS]: No, Your Honor.

21 MJ: Okay. Is there anything we need to address now before we  
22 recess the court?

23 TC[MAJ FEIN]: No, Your Honor.

1 CDC[MR. COOMBS]: No, Your Honor.

2 MJ: I do want to say something, there was some testimony  
3 elicited based on my questions from one of the earlier witnesses on  
4 something that I had ruled that I would instruct the members not to  
5 consider. I not going to consider it either just for the record.

6 TC[MAJ FEIN]: Yes, ma'am.

7 MJ: Do both sides know what I'm talking about?

8 CDC[MR. COOMBS]: Yes, Your Honor.

9 TC[MAJ FEIN]: Yes, Your Honor.

10 MJ: Anything else we need to address?

11 TC[MAJ FEIN]: No, Your Honor.

12 CDC[MR. COOMBS]: No, Your Honor.

13 MJ: Court is in recess.

14 **[The court-martial recessed at 1719, 3 June 2013.]**

15 **[END OF PAGE]**



1 [The court-martial was called to order at 0938, 4 June 2013.]

2 MJ: Court is called to order.

3 Trial Counsel, please account for parties.

4 TC[MAJ FEIN]: Ma'am, all parties when the court last recessed  
5 are again present with exception Captain Overgaard.

6 MJ: Are there any issues we need to address before we proceed  
7 today?

8 CDC[MR. COOMBS]: No, Your Honor.

9 ATC[CPT MORROW]: No, Your Honor.

10 MJ: All right. Government, call your next witness.

11 ATC[CPT MORROW]: Special Agent David Shaver.

12 **SPECIAL AGENT DAVID SHAVER, Civilian, was called as a witness for the**  
13 **government, was sworn and testified as follows:**

14 **DIRECT EXAMINATION**

15 **Questions by the assistant trial counsel [CPT MORROW]:**

16 Q. You are Special Agent David Shaver, Senior Special Agent,  
17 Special Inspector General for the Troubled Asset Relief Program,  
18 United States Department of Treasury?

19 A. Yes, sir.

20 Q. Special Agent Shaver, how long have you worked for the  
21 Treasury Department?

22 A. For about a year now, sir.

23 Q. What do you do for the Treasury Department?

1           A.    I'm a forensic examiner for them and a Special Agent.

2           Q.    And specifically, what kind of work do you do as a Special

3 Agent?

4           A.    Sir, my job mainly takes digital media, which has been

5 seized in a search warrant or is part of a search warrant or a

6 subpoena and turn it into usable format for the case agents of

7 SIGTARP.

8           Q.    Again, can you just explain for the Court what SIGTARP is?

9           A.    Sir, again, it's a Special Inspector General for the

10 Troubled Asset Relief Program. Our main focus is investigating fraud

11 involved with the bail out from a few years ago.

12          Q.    Before becoming a special agent with the Department of

13 Treasury, what did you do?

14          A.    Sir, I was the Special Agent in Charge for the Digital

15 Forensics and Research Branch of the Computer Crime Investigative

16 Unit.

17          Q.    What is the Digital Forensics and Research Branch?

18          A.    It's a unit of CCIU. Our main focus -- excuse me, CCIU's

19 focus is to investigate any intrusion into any Army computer

20 worldwide. The DFRB's focus was to conduct the forensic examinations

21 in support of that mission.

22          Q.    When did you begin working for Army CCIU?

23          A.    In 1999.

1 Q. And can you describe your process throughout the  
2 organization there.

3 A. Yes, sir. In 1999, I was assigned to CCIU as an enlisted  
4 Special Agent with Army CID. In 2001, I left the Army and in 2000 --  
5 in early 2002, I came back to work for CCIU as a contractor, as a  
6 digital forensic examiner. In 2003, I became a civilian Special  
7 Agent with Army CID.

8 Q. And that was CCIU?

9 A. Yes, sir, it was.

10 Q. And when did you become the Special Agent in Charge?

11 A. In 2005.

12 Q. Is that a supervisory position?

13 A. Yes, sir, it is.

14 Q. How many people did you supervise?

15 A. I directly supervised five, but I also had to support about  
16 70 examiners worldwide.

17 Q. Day-to-day, what kind of work did you do as the Special  
18 Agent in Charge of the Digital Forensics Research Branch?

19 A. I conducted forensic examinations in support of the CCIU  
20 mission. I also developed policies, procedures, methodologies. We  
21 also did tool testing and validation.

22 Q. And what do you mean by tool validation?

1       A.    It's concerning digital forensic tools.  We did things to  
2   make sure our forensic program actually did what it was supposed to  
3   do.  Did it do anything it was not supposed to do.  We just validated  
4   the findings.

5       Q.    Do you have any formal education, Special Agent Shaver?

6       A.    Yes, sir, I do.

7       Q.    From where?

8       A.    Ohio University.  I have a Bachelor of Arts.

9       Q.    What was your major there?

10      A.    Sociology, Criminology.

11      Q.    Agent Shaver, I want to get a little more in depth into  
12   your background into computer forensics.  First of all, what is  
13   computer forensics?

14      A.    Sir, computer forensics is simply just the examination of  
15   digital media.

16      Q.    What is digital media?

17      MJ:   Just a moment.

18      ADC[CPT TOOMAN]:   Your Honor, the defense would be willing to  
19   stipulate that Special Agent Shaver is an expert in computer  
20   forensics if it helps the process.

21      MJ:   All right.  Are you ----

1           ATC[CPT MORROW]:     Your Honor, we're going to ask just a few  
2     foundational questions just to explain some terms, but we'll be  
3     brief.

4           MJ: All right. That's fine. Thank you.

5     **Questions continued by the assistant trial counsel [CPT MORROW]:**

6           Q.     Special Agent Shaver, what is digital media?

7           A.     Digital media, sir, is just that, anything electronic such  
8     as a cell phone, a computer, a server, a cell phone, an SD card.

9           Q.     And have you received any certification in digital  
10    forensics?

11          A.     Yes, sir, I have.

12          Q.     What are those certifications?

13          A.     First one is the SCERS, which is the Seized Computer  
14    Evidence Recovery Specialist from the Federal Law Enforcement  
15    Training Center down in Glencoe, Georgia. The Certified Computer  
16    Crime Examiner from the Defense Cyber Crime Center, otherwise known  
17    as DC3, in Linthicum, Maryland. The NCASE certified examiner from  
18    Guidance Software out of Pasadena, California.

19          Q.     Have you published any articles related to the field  
20    computer forensics?

21          A.     Yes, sir, I have.

22          Q.     What is that? What have you published?

1       A.    Sir, in 2009, I co-wrote a chapter concerning Windows  
2 Forensics, in the Handbook of Digital Forensics Investigations.

3       Q.    Have you presented at any conferences in the field?

4       A.    Yes, sir, I have, several.

5       Q.    What are those conferences?

6       A.    The annual Department of Defense Cyber Crime Conference and  
7 the Annual Guidance Software Conference.

8       Q.    Did you ever receive any awards as a result of your work?

9       A.    Yes, sir, I have.

10      Q.    What did you receive?

11      A.    In 2009, I received the August Vollmer Award for individual  
12 contributions to forensic science from the International Associations  
13 of Chiefs of Police.

14      Q.    What was that award for?

15      A.    It was for two parts, sir. One was use of virtual machines  
16 in criminal investigations, and I wrote a tool to examine Windows  
17 computers to determine if they're compromised.

18      Q.    Just briefly, what do you mean by virtual machine?

19      A.    Sir, a virtual machine is a -- in this case we would take a  
20 forensic image and you would convert it into a machine, so your  
21 computer would be considered the host and the virtual machine would  
22 be considered the guest. The guest computer can be any operating  
23 system, whether it be a MAC, Linux or Windows. It would run on your

1 machine. The advantage of this is to see the computer as the subject  
2 or the person the computer.

3 Q. When you mean see the computer, the same desktop, and what  
4 do you mean by that?

5 A. Same desktop, same wallpaper, same program, their email  
6 programs. It is their computer. It's just in a virtual environment.

7 Q. Thank you. What is a forensic image? I know you've said  
8 that several times, just briefly for the Court, what is that?

9 A. Forensic image is the term we use. Technically computers  
10 are a highly organized space, and at lowest level they are a binary  
11 operating system. Binary being two as a bicycle has two wheels. And  
12 that lowest level is either a one or a zero. That is called a bit.  
13 When I say a forensic image, what I mean is it's a bit by bit  
14 forensic image. The forensic tool will be the first bit, whether  
15 it's a zero and it will write a zero. The next bit is a one it will  
16 read the one and write the one. It will continue to do this until  
17 all the media has been copied.

18 Q. And you said a forensic tool. What tool is that?

19 A. I used EnCase for this program.

20 Q. After the EnCase reads a one, writes a one, reads a zero,  
21 write a zero, what happens?

1           A.    Sir, it does something called -- it's called a verification  
2 hash value and the -- you can think of a hash value as a digital  
3 fingerprint. That's the easiest way to associate it.

4           Q.    And if two hash values match, what does that tell you?

5           A.    That they are the exact same thing.

6           Q.    And once you've verified the hash values, what's the next  
7 step in the process of examining a computer?

8           A.    If the hash values match, the next step would be to answer  
9 the questions which has been posed by the case agent.

10          Q.    You've mentioned EnCase. Briefly can you just describe  
11 what EnCase is?

12          A.    EnCase is the -- basically the standard, most common used  
13 forensic software on the market. It is used by both government and  
14 corporate entities.

15          Q.    And who owns EnCase?

16          A.    It's a company called Guidance Software. Again, they're in  
17 Pasadena, California.

18          Q.    Why do you use a tool like EnCase to examine or create  
19 images and then examine images?

20          A.    Sir, you're allowed to view the files in their native  
21 format without altering them. It also gives you the ability to view  
22 both the allocated and the unallocated spaces of a hard drive.

23          Q.    What is the allocated space on a hard drive?



1           A.    Allocates space is just that, files that are allocated.  So  
2  if you create a photo and save it to your desktop, that photo is  
3  considered allocated, it's there.  Unallocated are deleted files or  
4  files or space of the hard drive which has never been used.

5           Q.    Now, you said unallocated has never been used.  Does EnCase  
6  or tools like that, do they allow you to see deleted files or files  
7  that may have once existed and then now don't exist?

8           A.    Yes, sir.

9           Q.    Can you explain that, please?

10          A.    Again, the computer is a highly organized place.  Computers  
11  -- when you think of a computer you can think of it like a library.  
12  If you would like to find a certain book in the library, you would go  
13  to the card catalog.  If you look at the card catalog it will tell  
14  you where in the library the book is.  In a computer, at least on  
15  Windows, it's something -- it's not called a card catalog, it's  
16  called a master file table.  If you would like to view a file, the  
17  operating system will go down to the card -- the master file table,  
18  locate where on the hard drive that the file physically is and  
19  retrieve it for you.  When you delete a file, all you basically do is  
20  remove the entry from the master file table, or remove the card from  
21  the card catalog.  If you do that, you know the book is still  
22  physically in the library, it's just you can't access it normally.

1 Q. Now, when you say the book is still in the library, the  
2 data is still on the computer, when it's in the unallocated space,  
3 are you always able to recover the full file or is it partial files?  
4 Can you explain that, please?

5 A. Yes, sir. Again, once the computer realizes that the file  
6 or the space the file once resided is now free to be used for  
7 something else, it's just that, it's free to be used. If the  
8 operating system needs to write something, it could write --  
9 overwrite part of the file or all of the file.

10 Q. And what do you mean by overwrite?

11 A. It would use the space for another file. If you download  
12 some movies and it needs to put them somewhere it may overwrite the  
13 files.

14 ATC[CPT MORROW]: At this time, Your Honor, the United States  
15 offers Special Agent David Shaver as an expert in computer forensics.

16 ADC[CPT TOOMAN]: No objection.

17 MJ: All right. So recognized.

18 ATC[CPT MORROW]: Thank you.

19 ADC[CPT TOOMAN]: Briefly, Your Honor.

20 **CROSS-EXAMINATION**

21 **Questions by the assistant defense counsel [CPT TOOMAN]:**

22 Q. Good morning, Mr. Shaver.

23 A. Good morning, sir.

1 Q. Just a few questions for you. You talked a little bit  
2 about the process of taking a forensic image. You would agree with  
3 me that one of the tenants of an investigation is that when you're  
4 doing your forensic examination, you're going to document things?

5 A. Yes, sir.

6 Q. You're going to have guidance from another investigator and  
7 they're going to tell you what to look for?

8 A. Yes, sir.

9 Q. And if you find anything related to what you've been told  
10 to look for, you're going to document it?

11 A. Yes, sir.

12 ADC[CPT TOOMAN]: Nothing further, ma'am.

13 MJ: Redirect?

14 ATC[CPT MORROW]: No, Your Honor.

15 MJ: Temporary or permanent excusal?

16 ATC[CPT MORROW]: Temporary.

17 **[The witness was duly warned, temporarily excused and withdrew from**  
18 **the courtroom.]**

19 MJ: Government, are you ready to call your next witness?

20 ATC[CPT MORROW]: Yes, Your Honor. The United States calls Mr.  
21 Mark Johnson. For the record, Your Honor, Captain Tooman is moving  
22 to the panel box.

23 MJ: That's fine.

1 MARK JOHNSON, Civilian, was called as a witness for the government,  
2 was sworn and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the assistant trial counsel [CPT MORROW]:

5 Q. You are Mark Johnson, Army Computer Crimes Investigative  
6 Unit, Army Criminal Investigation Unit?

7 A. I am.

8 Q. Mr. Johnson, what is your current position at Army CCIU?

9 A. I'm assigned as a Digital Forensic Examiner.

10 Q. For -- Do you work for CCIU or do you work for a subunit?

11 A. I work for the Digital Forensics and Research Branch, a  
12 subunit of CCIU.

13 MJ: Okay. I'm having a little trouble hearing you. Can you  
14 maybe speak a little bit slowly?

15 WIT: Yes, ma'am.

16 Questions continued by the assistant trial counsel [CPT MORROW]:

17 Q. Where do you work?

18 A. Pardon me. What was the question again?

19 Q. Do you work for CCIU or do you work for a subunit?

20 A. I work for the Digital Forensics and Research Branch, a  
21 subunit of CCIU.

22 Q. How long have you been a digital forensic examiner for the  
23 DFRB?

1       A.    I've been there since approximately June of 2006.

2       Q.    Are you a Special Agent?

3       A.    No, sir, I am not.

4       Q.    What are you?  What's your position essentially?

5       A.    I am a contract employee assigned to the DFRB.

6       Q.    And when did you become a contract employee for CCIU?

7       A.    In June 2006.

8       Q.    Were you hired specifically to work at CCIU as part of a

9 contract?

10      A.    Yes, sir.

11      Q.    What does a digital forensic examiner do?

12      A.    A digital forensic examiner is responsible for examination

13 of digital or other cyber related media, devices, network equipment,

14 log files, pretty much anything related to computers.

15      Q.    And what do you mean by network device?

16      A.    It could be logs or analysis from things such as routers,

17 which is other communications equipment.

18      Q.    And do you hold a supervisory position at CCIU?

19      A.    I do.

20      Q.    And what is that position?

21      A.    I am the project lead for our contract.

22      Q.    And how many people do you supervise?

23      A.    I currently have two subordinates.

1 Q. Do you hold any certifications in digital forensics or  
2 computer forensics?

3 A. Yes, sir.

4 Q. What are those certifications?

5 A. I am certified through the Defense Cyber Crimes Center,  
6 also known as DC3. I hold the Digital -- Certified Digital Media  
7 Collector, the Digital Certified Forensic Examiner and the Cyber  
8 Crime Investigator Certifications.

9 Q. And do you hold any other industry certifications?

10 A. I do.

11 Q. What certifications do you hold?

12 A. I am a certified information systems security professional,  
13 also known as a CISSP.

14 Q. If you could explain to the Court, what is a CISSP?

15 A. CISSP is an industry standard certification. It's widely  
16 respected in the industry. It covers lots of demands related to  
17 information assurance, information security, computer technology.

18 Q. When did you obtain ----

19 ADC[CPT TOOMAN]: Your Honor, we'll stipulate to Mr. Johnson as  
20 an expert.

21 MJ: All right. Do you have additional foundational questions?

22 ATC[CPT MORROW]: Let me just briefly review, Your Honor.

23 MJ: All right.

1           ATC[CPT MORROW]:     At this time, Your Honor, the government  
2 offers Mr. Johnson as an expert in computer forensics.

3           ADC[CPT TOOMAN]:     No objection, Your Honor.

4           MJ:   So recognized.

5 **Questions continued by the assistant trial counsel [CPT MORROW]:**

6           Q.   Mr. Johnson, do you have a supervisor in the DFRB?

7           A.   I do.

8           Q.   Who is your current supervisor?

9           A.   Special Agent Fredrick Stonesacker [phonetic].

10          Q.   What is his position?

11          A.   He is the acting Special Agent in Charge of the Digital  
12 Forensics and Research Branch.

13          Q.   And prior to Special Agent Stonesacker, who was the Special  
14 Agent in Charge of the DFRB.

15          A.   That would be Special Agent David Shaver.

16          Q.   And how long did you work with Special Agent David Shaver?

17          A.   Since June 2006.

18          Q.   And typically -- and this applies to now and also when you  
19 worked for Special Agent Shaver, how do you receive an assignment?

20          A.   Normally, we'll receive a forensic request in writing that  
21 details what we're supposed to be looking for, which evidence to look  
22 at, the type of information they're looking for, legal basis and  
23 other related information.

## INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

**USE OF FORM** - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

**COPIES** - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

**ARRANGEMENT** - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.